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Supreme Court, U.S.
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No.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1986

KARL LINNAS,

Petitioner,

vs.

IMMIGRATION & NATURALIZATION SERVICE,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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168 pp

QUESTIONS PRESENTED

1. Whether a deportation hearing can be the basis for the United States to force a man to his decreed death in a foreign country.

2. Whether petitioner's deportation to the Soviet Union where he faces immediate execution pursuant to a death sentence that was imposed upon him in absentia in 1962 in a non-trial totally lacking in due process of law, deprives petitioner of due process and equal protection of the law, constitutes cruel and unusual punishment, and is a denial of fundamental human rights.

3. Whether, because deportation of petitioner will result in his execution in the Soviet Union, the deportation and the denaturalization proceedings which were a necessary antecedent to deportation, violated

petitioner's right to due process and equal protection of law and his right to be free of cruel and unusual punishment, in that, among other things, petitioner was not afforded a right to trial by jury in a court of law, petitioner was denied the benefits of his Fifth Amendment privilege against self-incrimination, the proceedings were viewed as civil, with deportation deemed not to constitute punishment, and the proceedings made use of Soviet-source evidence obtained under the supervision of Soviet authorities without due process of law.

4. Whether petitioner's deportation to the Soviet Union would be a de facto extradition which is illegal and deprives petitioner of due process of law because there is no treaty or statute of extradition between the United States and the Soviet Union.

5. Whether the deportation of petitioner to the Soviet Union to be executed pursuant to the sentence of death imposed upon him in absentia in 1962 would be not only a disguised extradition but is a mutual and cooperative undertaking by the United States and the Soviet Union with a shared purpose, making each responsible for constitutional violations by the other, requiring the U.S. to observe all constitutional guarantees that would apply if a trial and execution was conducted by the U.S.

6. Whether the Courts of the United States, consistent with their obligations and duties under the United States Constitution and their inherent responsibility to maintain and promote the rule of law can use the judicial power of the United States to force a person to submit to a death sentence imposed by a foreign power in pro-

ceedings totally lacking in due process of law--a trial in absentia, in which the conviction and death sentence were published in an official journal of the foreign power before the trial began?

7. Whether the Attorney General of the United States, because of the interest of the Justice Department's Office of Special Investigations (OSI) in securing the return of petitioner to the Soviet Union, in fulfilling its commitment or understanding with the Soviet Union arising from the Moscow Agreement of 1980, and in maintaining the continuing cooperation and assistance of the Soviet Union with respect to the body of cases OSI is prosecuting, is subject to a conflict of interest which deprives petitioner of due process of law in that it precludes any meaningful exercise of the broad discretion that is conferred upon

the Attorney General to designate the country of deportation pursuant to sec. 243(a) and undermines the reliability and trustworthiness of the steps taken and representations made by the Justice Department, which the Immigration Judge and the Board of Immigration Appeals and the Court of Appeals have accepted and relied upon, that there is no country in the world other than the Soviet Union that is willing to accept petitioner.

8. Whether the Holtzman amendment is a bill of attainder, as applied here to carry out a death sentence, because it inflicts punishment on an identifiable group without an escape clause and without judicial trial, in violation of Article 1, sec. 9, clause 3 of the United States Constitution.

9. Whether the United States Govern-

ment in order to accomplish petitioner's disguised extradition to the Soviet Union improperly and unlawfully abandoned its longstanding policy of non-recognition of the Soviet seizure of Estonia, and wrongfully refused to give effect to Karl Linnas's designation of his native government, the Free Republic of Estonia, which is in exile, as the country to which he should be deported.

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OPINIONS BELOW

The opinion of the Court of Appeals below, dated May 8, 1986, is reported at 790 F.2d 1024, and is reprinted in the appendix to this petition, A1.

With respect to petitioner's deportation, the opinions below of the Board of Immigration Appeals (BIA) and the Immigration Judge (IJ) are unreported and are reprinted in the appendix to this petition

as follows:

Opinion	Page of Appendix
BIA, dated October 16, 1985	A18
IJ, dated April 9, 1985	A30
BIA, dated July 31, 1984	A33
IJ, dated May 19, 1983	A51

With respect to petitioner's denaturalization, the opinion of the Court of Appeals dated January 25, 1982, is listed as unreported in a table, 685 F.2d 427, and is reprinted in the appendix to this petition, A57. This Court's denial of certiorari on October 4, 1982, is reported, 459 U.S. 883. The opinion of the District Court dated July 30, 1981, is reported 527 F.Supp. 426 (E.D.N.Y. 1981) and is reprinted in the appendix to this petition, A61.

JURISDICTIONAL GROUNDS IN THIS COURT

The decision of the Court of Appeals denying the petition for review of the order for petitioner's deportation was entered on May 8, 1986. A1. An order denying Karl Linnas's timely petition for rehearing was entered on June 25, 1986. A99. 28 U.S.C. sec. 1254(1) is the statutory provision which confers on the Court jurisdiction to review the judgment in question by writ of certiorari.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The following constitutional and statutory provisions are set out verbatim in the appendix to this petition:

United States Constitution

Article I, section 9, clause 3 . . . . . A-104

Fifth Amendment. A-104

Eighth Amendment A-104

Immigration and Nationality Act of 1952, as amended

sec. 241(a)(19), 8 U.S.C.
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sec. 243(a) and (h), 8 U.S.C.
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sec. 244(e), 8 U.S.C.
sec. 1254(e). A-109

STATEMENT OF THE CASE

Petitioner, Karl Linnas, was born in Estonia on August 6, 1919. He was 21 years of age in 1940 when the Soviet Union seized Estonia by force, and not quite 22 years of age when the Nazi government of Germany invaded Estonia in July 1941 and the events in Tartu with which he is charged allegedly occurred. At the end of World War II, Estonia was in Soviet hands and has remained within the U.S.S.R. The United States has never recognized the Soviet Union's forced incorporation of Estonia.

In 1951 Karl Linnas, together with his wife and two small daughters, came to the United States from West Germany as displaced persons, and settled on Long Island. In 1960 Karl Linnas was admitted to citizenship by the New York State Supreme Court (Suffolk County).

In January 1962 Karl Linnas was pur-

portedly tried in absentia by the Soviet Union for alleged war crimes, was convicted and sentenced to death. An official Soviet journal, Socialist Legality, reported the results of the trial, including Karl Linnas's conviction and death sentence, before the trial actually began. This issue of Socialist Legality was subsequently revised to eliminate the dates that showed it had been typeset and authorized for printing in December 1961, and was reissued with these and other revisions.*

In October 1978 changes, commonly known as the Holtzman amendment, were

*"[T]he U.S.S.R. Ministry of Justice, Procuracy, and Supreme Court are responsible for the publication of a scholarly monthly journal, Sotsialisticheskaia Zukonnost (Socialist Legality)... which publish[es] occasional reports of decided cases...The Procuracy, as indicated earlier, publishes a monthly journal, Socialist Legality, jointly with the U.S.S.R. Supreme Court." Harold J. Berman, Soviet Criminal Law and Procedure, the RSFSR Codes, 96, 101 (2d Ed. Harvard
(Footnote continues on next page)

enacted in the United States Immigration and Nationality Act of 1952, as amended (INA), to provide additional grounds for deporting from the United States aliens who collaborated with the Nazi government of Germany in persecution on the basis of race, religion, national origin or political opinion, and making these aliens ineligible for certain discretionary relief from deportation. P.L. 95-549, 92 Stat. 2065. In the fall of 1979, the Office of Special Investigations (OSI) was established in the Criminal Division of the Justice Department to conduct the proceedings against Nazi war criminals presaged by the Holtzman amendment.

In early 1980, as one of OSI's first

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*(footnote continuing from previous page) University Press 1972). Excerpts from both versions of this issue of Socialist Legality were offered in evidence and were excluded by the Immigration Judge. The Board of Immigration Appeals left this ruling undisturbed on the ground that the matter was adequately described in a Law Review article that was in evidence. A28.

initiatives, the head of OSI, Walter J. Rockler, and his deputy, Allan A. Ryan, Jr. met in Moscow with the Procurator General of the Soviet Union and members of his staff. At this meeting OSI sought and obtained the agreement of the Soviets to cooperate in obtaining evidence of war crimes for use in denaturalization and deportation proceedings in the United States. The meeting is recounted by Mr. Ryan in his book, Quiet Neighbors, Prosecuting Nazi War Criminals in America, (Harcourt Brace Jovanovich 1984). According to Mr. Ryan, toward the end of the meeting the Soviets raised the question, whether the persons against whom they provided evidence could be deported to the Soviet Union, and were given a noncommital answer. It was possible, but could not be guaranteed. The Soviets nodded silently and Ryan felt they believed, as did OSI, that such questions would probably be better

raised when the trials were over.*

In November 1979, the United States filed an action in the United States District Court for the Eastern District of New York to revoke Karl Linnas's citizenship as a first step toward the order for which review is now being sought--an order directing his deportation to the Soviet Union where he faces immediate death.

The government's complaint seeking denaturalization alleged that petitioner had served in a concentration camp in Tartu, Estonia during World War II and had concealed this service from U.S. authorities upon his entry into this country in 1951.

Petitioner's answer denied these allegations and raised, inter alia, the defense of laches. The District Court struck this defense on the ground that it

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* Quiet Neighbors 85-86. Apparently the agreement reached at the Moscow meeting was not reduced to writing, and no official summary or account of the meeting has ever been issued.

was not available against the government.

In response to government interrogatories, petitioner declined to answer and asserted a privilege against self-incrimination based upon (a) the nature and consequences of denaturalization proceedings and (b) fear of foreign prosecution. The Government responded that denaturalization proceedings were "civil" and that petitioner had no fear of foreign prosecution because he had been previously convicted in Soviet-occupied Estonia of the same acts. Petitioner argued that the Soviet "conviction" was a sham and obtained in violation of due process, and that he still had a fear of foreign prosecution. The District Court ruled that any privilege petitioner had was extinguished by the prior conviction.

At the trial OSI through the testimony of an expert witness introduced evidence showing that the Germans upon their invasion of Estonia engaged in systematic arrests and

atrocities against Jews and non-Jews with the assistance of Estonian volunteers. Another witness, a Finnish citizen, now living in Sweden, testified that he was a teenager living in Tartu, Estonia in July 1941, and that after the Germans invaded he often went in his spare time to Exhibition Grounds in Tartu where he saw Jews and non-Jews, including his piano teacher, imprisoned and under guard in barbed wire cages.

Prisoners in Tartu were originally detained at the Exhibition Grounds. The site was later moved to the Kuperjanov Barracks, a military camp on Kastani Street. Either of these places may have been called the Tartu Concentration Camp, but cannot be considered a concentration camp in the sense the phrase was later used in the history of Nazi Germany.

The witness further testified that the guards at the Exhibition Grounds were Estonians, that he knew Karl Linnas, who was older and ahead of him in high school,

and that he did not see Karl Linnas at the Exhibition Grounds.

Neither of these two witnesses gave any testimony about actions of Karl Linnas.

The evidence against Karl Linnas consisted of Soviet-source documents and deposition testimony of four witnesses taken in Estonia by OSI under Soviet supervision and ground rules.

Petitioner objected to these depositions because the Court had refused to order the government to pay petitioner's counsel fees and expenses and as a result his counsel was unable to attend and because the deposition procedures were unfair.

The District Court expressed concern about prejudicial language used by the Soviet prosecutor. Deposition testimony which identified Linnas as committing criminal acts was considered by the Court only as supportive and corroborative of what it

termed was OSI's primary evidence of Linnas' involvement at the camp at Tartu, documents allegedly signed by him as chief of the camp. n. 16 at A75.

The only other evidence of petitioner's involvement at the camp was a statement he allegedly made to a co-worker while riding in a car pool on Long Island in 1961. The co-worker testified that he asked petitioner about an article that had just appeared in Newsday, a local newspaper, reporting Soviet charges against petitioner and that petitioner denied he headed the camp at Tartu and said he was only a guard there.

In an opinion rendered on July 30, 1981, A61, the District Court ordered petitioner denaturalized. The Court disclaimed any reliance on facts it had ruled before trial would be deemed established by by adverse inference as a sanction for petitioner's refusal to provide discovery after

the Court denied petitioner's claim of privilege against self-incrimination. These facts are set forth in Appendix A and B to the Court's opinion, A92-94 and A94-97.

The District Court ruled that petitioner's loss of citizenship was warranted because his citizenship was "illegally procured" and because it was "procured by concealment of a material fact or by willful misrepresentation" A85-89, because, among other things, petitioner knowingly concealed the facts of his service at the prison camp in Tartu.

In an unreported opinion, the Court of Appeals affirmed the loss of citizenship "essentially for the reasons set forth in the district court's opinion," A59.

The Court of Appeals noted that "Judge Mishler consistently rejected appellant's fifth amendment claim in the context of

denaturalization proceedings." The Court deemed the issues raised by this rejection of petitioner's fifth amendment claims to be moot because the District Court purported to rely exclusively in its July 30 decision on evidence presented at the trial and disavowed reliance on the adverse inferences it had drawn before trial from petitioner's refusal to testify. A59, including the pretrial findings set forth in Appendix A and B to the District Court's opinion, A92-97.

The Court of Appeals also upheld the admissibility of the depositions taken in the Soviet Union, notwithstanding that petitioner was unrepresented at the depositions. It ruled that petitioner had not demonstrated that he was so indigent that the government should bear his attorney's costs in attending the depositions, that Judge Mishler had not abused the wide discretion ordinarily accorded a trial judge in passing on such expenses and that

any procedural deficiencies in the taking of the depositions went to their weight and not their admissibility, A59-60.

On October 4, 1982, this Court denied petitioner's application for a writ of certiorari, 459 U.S. 883.

While the application for a writ of certiorari was pending, OSI brought on an order to show cause dated June 15, 1982, commencing administrative proceedings seeking petitioner's deportation.

Hearings were held before an Immigration Judge (IJ) on various dates in 1982 and 1983. The OSI proof at the hearings consisted of portions of the record in the District Court denaturalization trial, as well as the District Court's decision and its affirmance. OSI contended that all of the material issues in the deportation proceeding had been decided adversely to petitioner in the denaturalization action and that petitioner was collaterally estopped from relitigating them. The IJ agreed with OSI on the colla-

teral estoppel issue and also purported to find petitioner independently deportable on the partial District Court record before him. The IJ rendered a decision on May 19, 1983, A51, finding petitioner deportable and statutorily ineligible for any discretionary relief on the basis of the Holtzman Amendment, A55. The IJ ordered petitioner deported to Estonia and designated the U.S.S.R. as the alternative place of deportation if Estonia was unwilling to accept petitioner into its territory or failed to advise the Attorney General within three months, A56.

Petitioner appealed to the Board of Immigration Appeals (BIA) which affirmed the IJ's decision in substantial part in a decision dated July 31, 1984, A33. However, the BIA did not affirm the designation of the U.S.S.R. as the alternate place of deportation. It remanded the issue to the IJ for further proceedings, to "consider the implications of the

United States' refusal to recognize the Soviet annexation of Estonia," to designate a country of deportation pursuant to sec. 243(a), 8 U.S.C. sec. 1253(a), and to articulate the statutory basis for selecting whichever country was designated, A50. The BIA noted that on the appeal OSI had failed to state its position on the effect of the Soviet annexation of Estonia upon the designation of a country of deportation, A49.

On remand OSI submitted to the IJ a declaration from the State Department Legal Adviser, dated December 20, 1984, stating his conclusion that "on the basis of the position of the Department of Justice, [that the deportation of Karl Linnas to the U.S.S.R. would be pursuant to section 243(a)(7), 8 U.S.C. sec. 1253(a)(7) i.e. to the U.S.S.R. as a country which is willing to accept him into its territory that the deportation of Mr. Linnas under 8 USC 1253(a)(7) to a place which we regard as

within the territory of the U.S.S.R. would not as a matter of law contravene the long-standing and firmly held United States policy of nonrecognition of the forcible incorporation of Estonia into the U.S.S.R." A111 (emphasis supplied).

The declaration also stated that the Department of State had been informed by the Department of Justice that the U.S.S.R. is willing to accept petitioner and that "at the current time, no other country has agreed to accept Mr. Linnas," A110. Letters from the West German Consulate and Canadian Embassy were submitted in support of OSI's assertion that no other country would accept the respondent, JA20 and JA14*, together with an affidavit of OSI's Director, Neal M. Sher, JA18, stating that at a meeting in July 1984 in Moscow, officials of the Soviet Procuracy told him that the U.S.S.R. is

*References beginning with "JA" are to the pages of the Joint Appendix on petitioner's deportation appeal to the Second Circuit, Docket No. 85-4163.

prepared to accept petitioner upon his deportation from the United States.

Petitioner presented witnesses who explained the history and significance of the non-recognition policy and testified that the non-recognition policy would be jeopardized by deporting an emigre from any of the Baltic States (Lithuania, Latvia and Estonia) to the Soviet Union, because the morale of emigres in the United States and persons now living in the occupied nations would suffer. A31. The IJ chose to follow the State Department's Legal Adviser, A32. The IJ ruled that seeking deportation to Estonia would be a "nugatory act" because the offices of the Republic of Estonia are in the United States, A30-31, and designated the U.S.S.R. as the country of deportation under either paragraph 4 or 7 of sec. 243(a), A32. The IJ also rejected petitioner's claim that his due process rights

would be violated by returning him to the USSR where he had been sentenced to death in absentia. A32.

Petitioner appealed to the BIA from the IJ's April 9, 1985 decision. In its decision dated October 16, 1985, A18, the BIA affirmed the designation of the U.S.S.R. as the country of deportation under sec. 243(a)(7), relying "most particularly" upon "the fact that the U.S.S.R., and no other country, has indicated a willingness to accept the respondent into its territory." A27. With respect to the non-recognition policy, the only opinion the BIA deemed relevant with respect to whether petitioner's deportation to the U.S.S.R. would violate U.S. foreign policy was that of the Department of State. A27. Regarding petitioner's upcoming execution in the Soviet Union, the BIA was of the opinion that our "Constitution does not extend beyond our borders to guarantee the [petitioner] fairness

in judicial proceedings in the Soviet Union". The BIA rejected petitioner's argument that its designation of the Soviet Union was unconstitutional because his expulsion to that country will, in effect, deprive him of his life without due process of law. A27-28.

Karl Linnas filed a timely petition with the Court of Appeals for review of the BIA's order of deportation. By an opinion dated May 8, 1986, the Court of Appeals denied the petition for review, A1. It ruled that the Holtzman amendment is not a bill of attainder, chiefly because deportation is not punishment, and that petitioner's deportation was not disguised extradition, because "the impetus for the denaturalization and removal of Linnas appears to have come from the government of the United States," citing the legislative history of the Holtzman amendment, whereas extradition is initiated by a

foreign state. A15.

In the Court's view, petitioner's own failure to designate a country of deportation lent credence to the Immigration Judge's finding that no country other than the Soviet Union would accept petitioner, so that there was no abuse of discretion in designating the Soviet Union as the country of deportation under sec. 243(a)(7). The Court ruled that it lacked jurisdiction to consider Linnas' claim that he will be denied due process in the Soviet Union, A16, and that because petitioner's conduct was deeply offensive to the Court's sense of decency, this was not a case in which the punishment facing Linnas in the Soviet Union offended the Court's sense of decency. A16-17.

REASONS FOR GRANTING THE WRIT

This is a death penalty case of first impression. The immediacy of death facing Karl Linnas as the outcome of his deportation hearing raises profoundly important issues about the reach of the due process clause of the Fifth Amendment and the Eighth Amendment's prohibition against cruel and unusual punishment and the jurisdiction and responsibility of United States Courts to enforce these constitutional provisions before it permits the U.S. to force a person to face death without due process of law in a foreign country.

We believe this is the first case to seek review in the United States Supreme Court from among those prosecuted by the Justice Department's Office of Special Investigations under the Holtzman amendment to the Immigration and Naturalization Act, in which the deportation order sought

to be reviewed both determines deportability and determines the country to which the petitioner is to be deported, and in which country--in this case the Soviet Union--the petitioner faces a death sentence.

Although this case is one of first impression it is also representative in several significant respects of the body of cases, numbering in the hundreds, that are currently being prosecuted or developed for prosecution under the Holtzman amendment by the Office of Special Investigations (OSI), a unit that has been operating for six years since it was established in late 1979 as part of the Justice Department's Criminal Division. Many of its cases, like the present one, are being carried forward by OSI in active cooperation with the Soviet Union for the shared purpose of effecting deportation to the Soviet Union. The cooperation is an outgrowth of the meeting in Moscow in early 1980 between representatives of OSI and

the Soviet Procuracy. See, Ryan, Quiet Neighbors, 65-93. The cooperation has included the taking of depositions in the Soviet Union, under the supervision of Soviet prosecutors and Soviet ground rules, and the furnishing of documents selected by the Soviets ostensibly from their archives for use against persons such as petitioner in denaturalization and deportation proceedings in the United States.

Prior denaturalization and deportation cases that reached this Court or in which review was sought, did not involve immediate death. This was the case in Fedorenko v. United States, 449 U.S. 490, 505 (1981), where Fedorenko was faced with charges as yet untried which could result in a sentence of death, and in Maikovskis v. INS, 773 F.2d 435 (2d Cir. 1985), cert. denied, No. 85-1483, 54 U.S. LW 3823, (June 16, 1986), where though the

petitioner was under a sentence of death imposed upon him in absentia, a different country was named in the deportation order. The possibility that these cases would result in death was uncertain and not immediate. There is no such uncertainty with respect to Karl Linnas's fate--he faces immediate death upon his deportation to the Soviet Union.

In the present case, the Court of Appeals and the immigration authorities held the lack of due process in the imposition of petitioner's death sentence in the Soviet Union, and petitioner's execution without due process once he is deported to the Soviet Union, were matters outside the jurisdiction of the courts of the United States and beyond the reach of the United States Constitution.

The Board of Immigration Appeals put the matter quite starkly, A28:

"Although the respondent has been sentenced to death in the Soviet Union in what appears to have been a sham trial, the

Constitution does not extend beyond our borders to guarantee the respondent fairness in judicial proceedings in the Soviet Union. Moreover, under our immigration laws there is no requirement that a foreign conviction must conform to our constitutional guarantees. Thus, due process is not violated by the respondent's deportation to the U.S.S.R." (Citations omitted.)

The Court of Appeals stated, A16:

"As to Linnas' claim that he will be denied due process in the Soviet Union, the jurisdiction of this court obviously does not extend beyond the borders of the United States. It is well established that the federal judiciary may not require that persons removed from the United States be accorded constitutional due process." (Citation omitted.)

The Immigration Judge took the position that petitioner's claim that his conviction and death sentence in absentia lacked due process "begs the question," stating: "[t]here is no lack of due process in the United States by designating as a country of deportation a place where by our standards, due process may have been violated." A32.

In taking this restrictive view of the reach of the constitution, the jurisdic-

tion of the federal courts and the inescapable effect of the federal action, none of the decisions below came to grips with the fact that the Soviet sentence is a death penalty. As this Court has repeatedly held, a death sentence is different from any other kind of punishment in both its severity and finality; there is a significant constitutional difference between a death penalty and lesser punishments. See, e.g., Beck v. Alabama, 447 U.S. 625, 637-39 (1980); cf. Reid v. Covert, 354 U.S. 1 (1957) (in capital cases, civilians accompanying servicemen overseas must be tried in civilian courts under civilian law and procedures and with all the safeguards of the Bill of Rights, and cannot be tried by court-martial.)

None of the cases cited in the decisions below as upholding or allowing deportation or extradition despite a lack of due process in the receiving country

was a case in which a death sentence had been imposed with or without due process. We are aware of no such case. It is unthinkable that a United States Court would allow deportation to be used to send a man to his decreed death in a foreign country without due process.

Although petitioner's death sentence was imposed by the Soviet Union, because of the cooperation and shared purpose of OSI and the Soviet Union in effecting petitioner's deportation, this should be considered as much a death penalty case as if the sentence had been imposed by a United States court.

Petitioner's death sentence was imposed in a trial totally lacking in due process of law. The results of the trial, including petitioner's conviction and death sentence, were reported before the trial actually began in an official journal for which the U.S.S.R. Procuracy and the U.S.S.R. Supreme Court are responsible. The lack of due

process in the 1962 trial is unquestionable. It casts grave doubt on the reliability of evidence supplied and other actions taken by the Soviet Union toward Mr. Linnas and other emigres from the Baltic nations residing in the United States and Canada. The Soviet Union has leveled unsupported accusations of war crimes against these emigres as part of longstanding, continuing efforts to discredit and demoralize their communities in the United States, and to strengthen the Soviet hold on the people of the former Baltic nations now residing under Soviet authority.

In extradition cases, where the general rule is that the conditions under which a person is to be surrendered to a foreign country are to be determined solely by the non-judicial branches of the U.S. Government, there is a considerable body of federal case law in the lower courts recognizing an inherent federal judicial power to examine the judicial processes and punish-

ments in a foreign nation requesting extradition and to refuse extradition if these are sufficiently "antipathetic to a federal court's sense of decency," Gallina v. Fraser, 278 F.2d 77, 79 (2d Cir. 1960). See also Anbjornsdottir-Mendler v. United States, 721 F.2d 679, 683 (9th Cir. 1983); Matter of Sindona, 450 F.Supp. 672 (S.D.N.Y. 1978), aff'd. sub nom. Sindona v. Grant, 619 F.2d 167, 174 (2d Cir. 1980); United States ex rel Bloomfield v. Gengler, 507 F.2d 925, 928 (2d Cir. 1974); In re Ryan, 360 F.Supp. 270 (E.D.N.Y. 1973).

This inherent power has yet to be employed because no sufficiently shocking situation has been presented to the Courts, Abjornsdatter v. Mendler, supra, 721 F.2d at 683; see also Matter of Burt, 737 F.2d 1477, 1487 (7th Cir. 1984) (extradition decisions based on diplomatic considerations may run afoul of exceptional constitutional limitations "as may exist because of particularly atrocious procedures or punishments employed

by the foreign jurisdiction." (Citations omitted)). Other cases make the same point by describing circumstances under which the judiciary could not permit the Executive Branch to hold exclusive sway. For example, in Prushinowski v. Samples, 734 F.2d 1016 (4th Cir. 1984), the Court noted the established rule that constitutional questions of deprivations of rights are addressed only to the acts of the United States government and not to those of a foreign nation requesting extradition, and then stated, at 1019:

> Seldom, however, can a principle of law be carried to absolute extremes without developing fissures. It is unlikely that extradition would be ordered if the facts were established, by assumption for purposes of argument, or by convincing proof, that the prisons of a foreign country regularly opened each day's proceedings with a hundred lashes applied to the back of each prisoner who did not deny his or her God or conducted routine breakings on the wheel for every prisoner.

In light of the uniqueness of the death penalty in severity and finality, a sentence of death imposed without due process is an intolerable punishment which

compels the exercise of this inherent power to prevent execution.

In the present case it is unnecessary to place exclusive reliance on this inherent power, because the initiatives and actions of OSI in cooperating with the Soviet Union in accepting the evidence the Soviets supply, and in sharing its purpose to deliver petitioner to the Soviet Union so that his death sentence can be executed make the United States equally responsible for this result, and requires the United States to observe all of the constitutional guarantees that would apply if a trial and execution were conducted by the United States. The United States must conform its conduct to the requirements of the Constitution, and the United States cannot deliver an individual to a foreign government for trial or punishment in violation of his constitutional rights. See Reid v. Covert, 35 U.S. 1, 16-19 (1957)

(plurality opinion); Rosado v. Civiletti, 621 F.2d 1179, 1195-96 (2d Cir.), cert. denied, 449 U.S. 856 (1980); Plaster v. United States, 720 F.2d 340, 346-49 (4th Cir. 1983); Matter of Burt, 737 F.2d 1477, 1484-85 (7th Cir. 1984).

A determination that the sentence imposed upon Karl Linnas in absentia was totally lacking in due process of law and should not be implemented by United States Courts is also justified under customary international law, which, of course, is part of federal law, The Nereide, 13 U.S. (9 Cranch) 388 (1915); The Paquete Habana, 175 U.S. 677 (1900), especially in light of the internationally recognized principle expressed in the International Covenant on Civil and Political Rights, G.A. Res. 2200, 21 U.N. GAOR Supp. (No. 16) at 52, U.N. Doc. A/6316 (1966), which has been ratified or acceded to by both the U.S.S.R. and the United States, that each individual has a right to a fair trial and that cruel and

degrading punishment is prohibited. See Filartiga v. Pena Iralam 630 F.2d 896, 897 (2d Cir. 1980).

The Court of Appeals below asserted that it was not "deaf to Linnas' protestations concerning the fate which may await him in the Soviet Union," and adverted to the inherent power hypothesized in Gallina v. Fraser, supra, to act against punishments and procedures antipathetic to a federal court's sense of decency.

The Court of Appeals found the key question to be whether the death sentence imposed upon petitioner without due process of law was a punishment so antipathetic to its sense of decency as to require it to intervene. It then declined to weigh that punishment on the ground that the heinousness of Karl Linnas' conduct offended its sense of decency. The Court ruled, in effect, that because the crimes with which Karl Linnas was charged -- crimes which the Court was

willing to say he had committed, though he has been convicted of no crime, and indeed has not even been tried for the crimes in a court of law -- offended the Court's sense of decency, his punishment did not. This is surely wrong. Due process of law, especially in capital cases, can not be allowed to vary with judicial approval or disapproval of the character of the defendant or the quality of the acts with which he is charged. Though the Court said it was not deaf to petitioner's protestations, it turned a deaf ear to them.

In apparently accepting as proven the heinous conduct ascribed to Karl Linnas A17, the Court of Appeals uncritically adopted the videotaped deposition testimony of Soviet witnesses taken by OSI under Soviet supervision in the Soviet Union which the District Court questioned and accepted "only as supportive and corroborative", n.16 at A75, and which petitioner has at all times vigorously protested because he was unrepre-

sented at the depositions, the depositions were taken pursuant to ground rules prescribed by the Soviets which violated U.S. standards of due process, and for the many reasons which make Soviet-source evidence notoriously unreliable. Federal cases have split in their assessment of Soviet-source evidence, and this Court has yet to consider these issues of reliability which have their roots in the fact that it is an important objective of the Soviet judicial system to advance the political interests of the Communist party and the Soviet State. Soviet-source evidence has been severely criticized on grounds which apply in the present case. See, e.g. U.S. v. Kungys, 571 F.Supp. 1104, 1123-1133 (D.N.J. 1983) reversed on other grounds, 793 F.2d 516, 520 (3rd Cir. 1986) (collecting cases on the reliability of depositions taken in the Soviet Union, n. 2 at 520); pet. for certiorari filed on August 9, 1986, No. 86-

228. The problem, its background, the Soviet-source evidence that has been supplied to date, and the U.S. case law, is thoroughly discussed in Denaturalization of Suspected Nazi War Criminals: The Problem of Soviet - Source Evidence, 24 Columbia J. Transnational Law 365 (1986), which includes with the admonition that Soviet-source evidence should continue to be viewed with extreme skepticism by U.S. tribunals, see e.g. 368.

When OSI filed its denaturalization complaint against Karl Linnas in November 1979 its objective was then as it is now to deport him to the Soviet Union to face an extant sentence of death. Because this was OSI's purpose, the proceedings against Karl Linnas should have been viewed from the outset, as an integrated whole, rather than as separate denaturalization and deportation proceedings, and as criminal, not civil. Where the sought-for result of deportation is immediate death by execution it is not

rational to say that deportation is not punishment or to rely for that proposition on deportation cases in which the purpose of deportation was simply to compel the departure of the deportee from the United States.

Although as we have said, we believe this is the first OSI case to seek review in this Court in which the petitioner faces immediate death in the country of deportation, the menace of death by execution without due process of law permeates OSI's cases. Feodor Fedorenko whose denaturalization was upheld by this Court on January 21, 1981, was sentenced to death on June 19, 1986, in the Soviet Union (N.Y. Times, June 20, 1986). In Maikovskis, supra, in which this Court denied certiorari on June 16, 1986, it remains to be seen whether Maikovskis will be deported to Switzerland, the country he has designated, or the Soviet Union where he is under a sentence of death imposed in absentia.

It is past time to abandon the fiction that the OSI denaturalization and deportation cases are civil and do not constitute punishment. The present case affords this Court an important opportunity to clarify that these cases should be deemed criminal and that deportation under these circumstances does constitute punishment. This clarification would importantly serve the interests of justice, because it would made clear for future cases and the present one that defendants, such as petitioner, must be afforded from the outset a right to trial by jury in a court of law, the benefits of the Fifth amendment privilege against self-incrimination and all of the other constitutional safeguards to which a criminal defendant is entitled.*

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* Efforts to obtain trial by jury in OSI and earlier war crime denaturalization cases either under the Seventh Amendment, or Article III and the Sixth Amendment or the due process clause have been rejected on (footnote continues on next page)

Recognition that the kind of deportation sought by OSI against petitioner is punishment would also put in correct perspective the issue whether the Holtzman amendment is a bill of attainder, as petitioner urged below based on this Court's explication of the elements of a bill of attainder in Selective Service System v. Minnesota Public Interest Research Group, 468 U.S. 841 (1984). In deciding that the Holtzman amendment was not a bill of attainder the Court of Appeals below relied principally, as did the Ninth Circuit in Artukovic v. INS, 693 F.2d 894, 897 (1982) on the concept

*(footnote continuing from previous page) the authority of Luria v. U.S., 231 U.S. 9 (1913), which likened a denaturalization case to a suit in equity to cancel a patent for which there was no trial by jury under the Seventh Amendment, and by continued adherence to the view that denaturalization proceedings are equitable and civil in nature. U.S. v. Kairys, 782 F.2d 1374, 1384 (7th Cir.), cert. denied, May 27, 1986, No. 85-1752; U.S. v. Schellong, 717 F.2d 329, 336 (7th Cir. 1983) cert. denied, 465 U.S. 1007 (1984); U.S. v. Walus, 616 F.2d 283, 304 (7th Cir. 1980).

that deportation is not punishment. Given the volume and life-threatening nature of the cases OSI is bringing on the strength of the Holtzman amendment, it is important for this Court to decide the issue.

It is also past time to recognize that OSI deportation cases that are being prosecuted with Soviet cooperation, such as the present case, constitute disguised extradition, which is illegal and violates due process of law because extradition must be authorized by treaty or statute and there is no such treaty or statute between the United States and the Soviet Union. It is not open to dispute that the Soviet Union is seeking the return of Karl Linnas. Nor can it be questioned that OSI can be expected to do its best to deliver an individual such as petitioner to the Soviet Union by virtue of the Moscow agreement and OSI's interest in ensuring continuing Soviet cooperation and assistance in the prosecution of the bulk of

its cases which depend heavily on evidence in Soviet hands.

The extent to which OSI is committed to securing petitioner's return to the Soviet Union is shown by the flimsiness of the basis OSI has profferred for two of the key findings that cleared the way for the BIA's designation of the Soviet Union as the country of deportation under INA sec. 243(a)(7): First, that there is no country in the world other than the Soviet Union willing to accept petitioner, and second, that petitioner's deportation to the Soviet Union would not contravenue the United States policy of nonrecognition of the forcible incorporation of Estonia into the U.S.S.R.

The keystone to both of these findings is a declaration by the State Department Legal Advisor, given on December 20, 1984, A110.

The declaration fails to give any significant support to either finding. With

respect to the willingness of other countries to accept petitoner the declaration states merely: "In addition, at the current time, no other country has agreed to accept Mr. Linnas." A110. On the second finding, which the BIA stressed was a foreign policy question on which the State Department's views should be determinative, A 27, the opinion expressed in the declaration --that petitioner's deportation would not contravene the nonrecognition policy -- is stated "as a matter of law" A111. This is inadequate on its face to serve as a meaningful answer to a genuinely difficult foreign policy question, and is patently insufficient to overcome the testimony given on petitioner's behalf, that in fact, matters of law notwithstanding, the return of Karl Linnas to the Soviet Union would deal a heavy blow to the nonrecognition policy in the minds and hearts of emigres from the Baltic nations in the United States in west

Europe and elsewhere and the people of former Baltic nations now under the authority of the Soviet Union who are depending heavily on the nonrecognition policy of the United States as a means to eventual self-determination and freedom.

CONCLUSION

The petition for a writ of certiorari to the United States Court of Appeals for the Second Circuit should be granted.

Respectfully submitted,

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August 1986

APPENDIX

Opinion of the Court of Appeals below, dated May 8, 1986

[CORRECTED OPINION]

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

No. 895—August Term 1985

(Argued March 17, 1986 Decided May 8, 1986)

Docket No. 85-4163

KARL LINNAS,

Petitioner,

—v.—

IMMIGRATION & NATURALIZATION SERVICE,

Respondent.

Before:

PIERCE, MINER and ALTIMARI,

Circuit Judges.

Karl Linnas petitions for review of an order of deportation from the Board of Immigration Appeals dated October 16, 1985 which affirmed the decision of an immigration judge to deport petitioner to the Soviet

Opinion of the Court of Appeals below, dated May 8, 1986

Union pursuant to section 243(a) of the Immigration and Nationality Act, 8 U.S.C. § 1253(a).

Denied.

IVARS BERZINS, ESQ., Babylon, New York, *for Petitioner.*

RUDOLPH W. GIULIANI, United States Attorney for the Southern District of New York, New York City, Neal M. Sher, Director Office of Special Investigations, Washington, D.C. (Michael D. Patrick, Special Assistant United States Attorney, Michael Wolf, Deputy Director Office of Special Investigations, Steven E. Obus, Assistant United States Attorney, Philip L. Sunshine, Aron A. Goldberg, Trial Attorneys Office of Special Investigations, of counsel) *for Respondent.*

ELI M. ROSENBLUM, ESQ. New York, New York, *for The World Jewish Congress, Amicus Curiae.*

MARC D. STERN, ESQ., Phil Baum, Esq., New York, New York (Samuel Rabinove, Dennis Rapps, of Counsel), *for the American Jewish Congress, Amicus Curiae.*

Opinion of the Court of Appeals below, dated May 8, 1986

ALTIMARI, *Circuit Judge*:

Petitioner, Karl Linnas, seeks review of an order of the Board of Immigration Appeals ("BIA") determining that petitioner must be deported to the Soviet Union. The BIA ordered Linnas deported under section 241(a) of the Immigration and Nationality Act ("INA"), 8 U.S.C. § 1251(a), because of Linnas' active participation in the Nazi persecution of Estonian Jews during World War II. The Soviet Union was designated as the country of deportation pursuant to section 243(a) of the INA, 8 U.S.C. § 1253(a).

Linnas now seeks review of the determination of the BIA on the ground that sections 241(a)(19), 243(h) and 244(e) of the INA, 8 U.S.C. §§ 1251(a)(19), 1253(h), and 1254(e), constitute a bill of attainder in violation of Article I, section 9 of the Constitution of the United States. Alternatively, Linnas argues that his deportation to the Soviet Union would violate his rights to due process and equal protection.

BACKGROUND

Karl Linnas was born in Estonia in 1919 and entered the United States in 1951 under the auspices of the Displaced Persons Act ("DPA"), Pub. L. No. 80-774, 62 Stat. 1009 (1948), *amended by* Pub. L. No. 81-555, 64 Stat. 219 (1950). In order to gain admittance to the United States as a displaced person, Linnas informed members of the Army Counter Intelligence Corps that he had been a university student during the years 1940 to 1943. In May 1951 Linnas signed an immigration form stating that he had "never advocated or assisted in the persecution of any person because of race, religion or

national origin." Upon entering the United States some three months later, Linnas swore to the truth of that statement. The New York State Supreme Court (Suffolk County) admitted Linnas to citizenship in 1960. *See United States v. Linnas*, 527 F. Supp. 426, 436-38 (E.D.N.Y. 1981), *aff'd*, 685 F.2d 427 (2d Cir.), *cert. denied*, 459 U.S. 883 (1982).

In 1979, the government began an action to revoke Linnas' certificate of naturalization on the grounds that it had been "illegally procured" and "procured by concealment of a material fact or by willful misrepresentation." *See* 8 U.S.C. § 1451(a). Because American citizenship is such a precious possession, denaturalization is not a process which may be lightly accomplished. The government, therefore, had the heavy burden of proving its case against Linnas by clear, unequivocal and convincing evidence which did not leave the issue in doubt. *See Fedorenko v. United States*, 449 U.S. 490, 505 (1981).

The evidence presented at Linnas' denaturalization trial before District Judge Jacob Mishler was overwhelming and largely uncontroverted. The government presented eyewitness testimony that Linnas was chief of the Nazi concentration camp in Tartu, Estonia during the time period that Linnas later claimed to have been a university student.

Linnas' duties as a concentration camp chief were such as to offend the decency of any civilized society. Eyewitnesses testified that Linnas supervised the transportation of prisoners from his camp to a nearby antitank ditch. On such occasions innocent Jewish women and children were tied by their hands and brought in their underwear to the edge of the ditch where they were forced to kneel. The guards then opened fire. The ditch became a mass grave.

There was also eyewitness testimony that Linnas on at least one occasion announced his victims' death sentence at the side of the ditch and gave the order to fire. Linnas was also said to have then personally approached the edge of the ditch, and fired into it. Another eyewitness recounted having seen Linnas help direct Jews out of a school and onto a schoolbus. That witness recalled that Linnas helped a small child with a doll onto the bus, and that the doll was later placed in a storage area for the personal effects of those who had been killed.

The government also introduced documents signed "Karl Linnas, Chief of Concentration Camps," and "Chief of Tartu Concentration Camp." Documentary evidence was also introduced showing that Linnas later joined the 38th Estonian Police Battalion under the command of a senior colonel of the SS and was wounded in battle on August 30, 1944.

From the evidence presented at trial, Judge Mishler concluded that it was "beyond dispute that defendant, Karl Linnas, 'assisted the enemy in persecuting civil populations of countries' . . . . The inescapable conclusion is that defendant unlawfully entered the country because of the willful misrepresentations he made." *United States v. Linnas*, 527 F. Supp. at 439. That conclusion was affirmed by this court on January 25, 1982. *United States v. Linnas*, 685 F.2d 427 (2d Cir.), *cert. denied*, 459 U.S. 883 (1982). The horrific facts of Linnas' past exemplify what this court has described as the clearest case of involvement in persecution: one in which "an individual, often while employed at a concentration camp, has personally arrested, or fired upon detained civilians, or has ordered others to do so." *United States v. Sprogis*, 763 F.2d 115, 122 (2d Cir. 1985) (citing *United States v. Linnas*, 527 F.Supp. 426 (E.D.N.Y. 1981)).

Following Linnas' denaturalization, the government began deportation proceedings under section 242 of the INA, 8 U.S.C. § 1252. Immigration Judge Howard I. Cohen ruled on May 19, 1983 that Linnas was deportable. Linnas had designated "the free and independent Republic of Estonia" as the country to which he wished to be deported. The independent Republic of Estonia was forcibly incorporated into the Soviet Union following World War II. Linnas apparently intended his designation to mean the office building in New York currently housing the representatives of the independent Republic of Estonia. Immigration Judge Cohen, however, apparently took Linnas' designation to mean that geographic territory historically associated with the Republic of Estonia and currently incorporated in the Soviet Union. In attempting to comply with § 243 of the INA, Immigration Judge Cohen ordered that Linnas be deported from the United States to Estonia, but that if Estonia was unwilling to accept Linnas he was to be deported to the Soviet Union. The Soviet Union, which had tried Linnas in absentia and sentenced him to death for his war crimes, was the only country which had expressed a willingness to accept Linnas. Linnas' request for discretionary relief was denied on the ground that such relief is not available to Nazi persecutors under sections 212(a)(33) and 241(a)(19) of the INA.

Linnas filed a timely appeal to the BIA. On July 31, 1984 the BIA affirmed the decision of the immigration judge except as to the country of deportation. The BIA remanded the case to the immigration judge with instructions to consider the effect of the United States' nonrecognition of the Soviet annexation of Estonia and to articulate a statutory basis for the designation of a country of deportation.

On remand, Immigration Judge Cohen reviewed the three step process delineated in § 243(a) of the INA for designation of a country of deportation. Step one, the designation of a country by the deportee, was ruled inapplicable because of Linnas' designation of an office building in New York. Step two, the designation of a country of which the deportee is a citizen, was also held inapplicable. Linnas claimed to be a citizen of the Republic of Estonia, but that country no longer exists as an independent geographic territory. Under step three, the immigration judge may designate deportation to any country which falls within one of seven categories. Immigration Judge Cohen, therefore, considered deportation:

(1) to the country from which such alien last entered the United States;
(2) to the country in which is located the foreign port at which such alien embarked for the United States or for foreign contiguous territory;
(3) to the country in which he was born;
(4) to the country in which the place of his birth is situated at the time he is ordered deported;
(5) to any country in which he resided prior to entering the country from which he entered the United States;
(6) to the country which had sovereignty over the birthplace of the alien at the time of his birth; or
(7) if deportation to any of the foregoing places or countries is impracticable, inadvisable, or impossible, then to any country which is willing to accept such alien into its territory.

8 U.S.C. § 1253(a). On April 9, 1985, after considering a letter from the Legal Advisor of the Department of State to the effect that Linnas' deportation to the Soviet Union

would not violate the nonrecognition policy, Immigration Judge Cohen held that Linnas should be deported to the Soviet Union under either category (4) or (7). Linnas once again appealed to the BIA, which, in a decision dated October 16, 1985, affirmed the immigration judge's decision based on § 243(a)(7).

Petitioner now seeks review of the BIA's decision on two grounds. First, Linnas contends that sections 241(a)(19), 243(h) and 244(e) of the INA, commonly referred to as the Holtzman amendment, constitute a bill of attainder. Second, Linnas contends that deportation to the Soviet Union would constitute a disguised extradition in violation of his rights to equal protection and due process.

DISCUSSION

I. *Bill of Attainder*

Article I, section 9 of the United States Constitution provides in unequivocal terms that "[n]o Bill of Attainder or ex post facto Law shall be passed." The wisdom of that constitutional command has been held in universally high esteem throughout the history of American jurisprudence. The issue now before this court is whether the legislation in question constitutes a bill of attainder.

A bill of attainder is defined as "a legislative act which inflicts punishment without a judicial trial." *United States v. Lovett*, 328 U.S. 303, 315 (1946) (quoting *Cummings v. Missouri*, 71 U.S. (4 Wall.) 277, 323 (1867)). Such bills are condemned in the Constitution largely because they represent a legislative encroachment on powers more properly exercised by the judiciary. A bill of attainder, "assumes, in the language of the textbooks, judicial

magistracy; it pronounces upon the guilt of the party, without any of the forms or safeguards of trial." *Cummings v. Missouri*, 71 U.S. (4 Wall.) at 323. Historically, bills of attainder carried a death penalty while bills of pains and penalties carried lesser punishments. The bill of attainder clause of the Constitution, however, has been consistently construed to apply to bills of pains and penalties as well as bills carrying a death penalty. *See, e.g., United States v. Brown*, 381 U.S. 437, 441 (1964); *United States v. Lovett*, 328 U.S. at 315; *Cummings v. Missouri*, 71 U.S. (4 Wall.) at 323.

Bills of attainder have historically been passed in times of rebellion such as the rebellion of the Earl of Kildare in Great Britain, *see* 28 Hen. VIII., ch. 18, or the Civil War here in the United States. *See generally Cummings v. Missouri*, 71 U.S. (4 Wall.) 277 (1867) (discussing bill of attainder of persons who aided rebellion against United States). The temptation to utilize bills of attainder is especially strong when national security is thought to be threatened. *See generally United States v. Lovett*, 328 U.S. 303 (1946) (discussing attainder of government employees thought "subversive" during wartime).

Linnas argues that the Holtzman amendment is a legislative enactment directed at a small group of individuals, Nazi war criminals, for the purpose of punishing those persons without judicial trial. Linnas contends that such a statute constitutes a prohibited bill of attainder. The Holtzman amendment, in essence, requires the deportation of persons shown to have participated in Nazi persecution during World War II, and eliminates the Attorney General's power to grant such persons discretionary relief. The deportation of Nazi persecutors is

required even though the deportee's life or freedom might be threatened as a result.[1]

Applying the elements of a bill of attainder to the Holtzman amendment, it is readily apparent that the

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1 The challenged legislative enactment, in full, amends various provisions of the INA to provide:

> Deportable aliens—general classes
>
> (a) Any alien in the United States (including an alien crewman) shall, upon the order of the Attorney General, be deported who—
>
> * * *
>
> (19) during the period beginning on March 23, 1933, and ending on May 8, 1945, under the direction of, or in association with—
>
> (A) the Nazi government of Germany,
>
> (B) any government in any area occupied by the military forces of the Nazi government of Germany,
>
> (C) any government established with the assistance or cooperation of the Nazi government of Germany, or
>
> (D) any government which was an ally of the Nazi government of Germany,
>
> ordered, incited, assisted, or otherwise participated in the persecution of any person because of race, religion, national origin, or political opinion.
>
> 8 U.S.C. § 1251(a)(19).
>
> Withholding of deportation or return
>
> (1) The Attorney General shall not deport or return any alien (other than an alien described in section 1251(a)(19) of this title) to a country if the Attorney General determines that such alien's life or freedom would be threatened in such country on account of race, religion, nationality, membership in a particular social group, or political opinion.
>
> (2) Paragraph (1) shall not apply to any alien if the Attorney General determines that—
>
> (A) the alien ordered, incited, assisted, or otherwise participated in the persecution of any person on account of race, religion, nationality, membership in a particular social group, or political opinion;
>
> (B) the alien, having been convicted by a final judgment of a particularly serious crime, constitutes a danger to the community of the United States;

challenged provisions are a legislative act. In determining whether that act constitutes punishment the court must consider: "(1) whether the challenged statute falls within the historical meaning of legislative punishment; (2) whether the statute, 'viewed in terms of the type and severity of burdens imposed reasonably can be said to further nonpunitive legislative purposes'; and (3) whether the legislative record 'evinces a congressional intent to punish.' " *Selective Service System v. Minnesota Public Interest Research Group*, ____ U.S. ____, 104 S. Ct. 3348, 3355 (1984) (quoting *Nixon v. Administrator of General Services*, 433 U.S. 425, 473 (1977)).

Linnas contends that the Holtzman amendment is within the historical meaning of legislative punishment because deportation is the equivalent of banishment. Banishment is a punishment often associated with bills of

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(C) there are serious reasons for considering that the alien has committed a serious nonpolitical crime outside the United States prior to the arrival of the alien in the United States; or

(D) there are reasonable grounds for regarding the alien as a danger to the security of the United States.

8 U.S.C. § 1253(h).

Voluntary departure

The Attorney General may, in his discretion, permit any alien under deportation proceedings, other than an alien within the provisions of paragraph (4), (5), (6), (7), (11), (12), (14), (15), (16), (17), (18), or (19) of section 1251(a) of this title (and also any alien within the purview of such paragraphs if he is also within the provisions of paragraph (2) of subsection (a) of this section), to depart voluntarily from the United States at his own expense in lieu of deportation if such alien shall establish to the satisfaction of the Attorney General that he is, and has been, a person of good moral character for at least five years immediately preceding his application for voluntary departure under this subsection.

8 U.S.C. § 1254(e).

attainder. *Nixon v. Administrator of General Services*, 433 U.S. at 474; *United States v. Brown*, 381 U.S. at 441; *Kennedy v. Mendoza-Martinez*, 372 U.S. 141, 168 n. 23 (1962). Exclusion of a citizen of the United States has at times been held to constitute punishment equivalent to banishment. *See Kennedy v. Mendoza-Martinez*, 372 U.S. at 166-70 (forfeiture of citizenship and deportation as alien of native-born Americans); *In re Yung Sing Hee*, 36 F. 373 (9th Cir. 1888) (exclusion of American citizen of Chinese ancestry under Chinese Labor Exclusion Act). Deportation of noncitizens from the United States, however, has generally been held not to constitute punishment. *See Immigration and Naturalization Service v. Lopez-Mendoza*, ____ U.S. ____, 104 S. Ct. 3479, 3484 (1984); *Mahler v. Eby*, 264 U.S. 32, 39 (1923); *Bugajewitz v. Adams*, 228 U.S. 585, 591 (1913); *Fong Yue Ting v. United States*, 149 U.S. 698, 730 (1893). Linnas is not a citizen of the United States. This case presents little reason for breaking with the traditional rule that deportation, although often severely burdensome, is not punishment. The exclusion of Linnas from ever entering the country would certainly not fit any historical meaning of punishment. To say that his deportation becomes punishment by virtue of his current presence in the United States, a presence fraudulently attained in 1951, would grant Linnas additional protection under the law as a result of his having sworn to untrue statements.

In order to determine whether the Holtzman amendment can be said to further a nonpunitive purpose the court must consider the type and severity of the burdens imposed. It is beyond cavil that deportation generally, and in this case particularly, imposes a severe burden on the deportee. Severity, however, does not in itself make a

burden a punishment. *Mahler v. Eby*, 264 U.S. at 39. Deportation furthers the nonpunitive legislative purpose of protecting the citizenry from persons harmful to the public good. In the case of Nazi persecutors, it borders on sophistry to deny the legitimate legislative purposes of excluding known mass murderers from the United States. It was certainly reasonable for the citizens of the United States, through their elected representatives, to conclude that they did not wish to share their communities with persons who ordered the wholesale extermination of innocent men, women and children. It is also reasonable for the United States, apart from any punitive intent, to wish not to be known in the family of civilized nations as a haven for the refuse of the Nazi abomination.

There is little indication in the legislative record of any Congressional intent to use the Holtzman amendment to punish. Although one Representative did comment that the Holtzman amendment would provide a device for bringing the culpable "to justice," 124 Cong. Rec. H31648 (daily ed. September 26, 1978) (statement of Rep. Gilman), the legislative record as a whole evinces only an intent to exclude from the United States those persons who committed crimes against humanity in the name of Nazism. H.R. Rep. No. 1452, 95th Cong., 2nd Sess., *reprinted in* 1978 U.S. Code Cong. & Ad. News 4700. Congress' goals in passing the Holtzman amendment appear to have been the need to "put our Government squarely on record as denying sanctuary in the United States to Nazi War criminals," and to "reaffirm our commitment to human rights." 124 Cong. Rec. H31647 (daily ed. September 26, 1978) (statements of Rep. Holtzman).

Opinion of the Court of Appeals below, dated May 8, 1986

The Ninth Circuit Court of Appeals faced the issue now before this court in *Artukovic v. Immigration and Naturalization Service* and concluded that the Holtzman amendment is not a bill of attainder because deportation is not punishment. 693 F.2d 894, 897 (1982). We now reach the same conclusion. Because the Holtzman amendment is not punishment and, therefore, not a bill of attainder, we need not consider whether Linnas was deported without a judicial trial. We note, however, that Linnas did in fact receive extensive judicial review.

II. *Equal Protection and Due Process*

Linnas claims that his deportation to the Soviet Union is in fact a disguised extradition. Linnas was convicted *in absentia* in the Soviet Union and sentenced to death for his war crimes. Linnas contends that the Soviet trial was a sham and that deporting him to the Soviet Union is in fact extradition in the absence of an extradition treaty. Linnas argues that to deport him under these circumstances will deprive him of his life without due process.

The irony of Karl Linnas objecting to execution without due process is not lost on this court. The right to due process is, of course, essential to the American system of ordered liberty, and must be extended to all persons in the United States. The fact that Linnas enjoys the right to due process has enabled him to remain in the United States until 1986 even though the government began the denaturalization process in 1979. The considerable length of time that Linnas has been able to remain in the United States after the discovery of his heinous past is a small price to pay for a system of law which separates our government from the government that Linnas served as Chief of the Tartu concentration camp. We now,

therefore, examine the merits of the petitioner's due process claim.

Linnas' argument centers on the proposition that a noncitizen has a right not to be extradited in the absence of an extradition treaty. We need not address this novel question, however, because no extradition has taken place in this case. Extradition may be applied to either a citizen or noncitizen, whereas deportation applies only to noncitizens such as Linnas. *See* 8 U.S.C. § 1251 *et seq.* Extradition is initiated by a foreign state. While the Soviet Union may have an interest in the trial of Nazi war criminals, the impetus for the denaturalization and removal of Linnas appears to have come from the government of the United States. The legislative history of the Holtzman amendment indicates that the Congress intended to rid this nation of Nazi war criminals, not to court favor with nations having no extradition treaties with the United States. *See* 124 Cong. Rec. H31647-50 (daily ed. September 26, 1978). Ruling this procedure to be an extradition would greatly reduce the ability of this nation to deport those who have committed crimes of moral turpitude in their own countries.

In addition, Linnas was given the same opportunity given to any deportee to designate a country to which he wished to be sent. Linnas designated an office building in New York, thus wasting the opportunity to choose a proper place of deportation. The fact that such an opportunity was offered, however, strongly undercuts his contention that his deportation was a disguised attempt to extradite him to the Soviet Union. The record also indicates that the government made at least some attempt to find a country other than the Soviet Union which would accept Linnas. There is no support in the record for

Linnas' claim that the government's efforts in this regard were a mere facade. Linnas' own failure to designate a country of deportation lends credence to the immigration judge's finding that no country other than the Soviet Union would accept him. Accordingly, there was no abuse of discretion in designating the Soviet Union as the country of deportation under 8 U.S.C. § 1253(a)(7). That designation did not transform the deportation of Linnas into an extradition.

Congress has broad authority over the status of aliens, and there is no substantive due process right not to be deported. *See, e.g., Galvan v. Press*, 347 U.S. 522, 530-32 (1954); *Harisiades v. Shaughnessy*, 342 U.S. 580, 590-91 (1952); *Basset v. United States Immigration and Naturalization*, 581 F.2d 1385, 1386-87 (10th Cir. 1978). Linnas' procedural due process rights have been meticulously observed throughout the denaturalization and deportation proceedings. As to Linnas' claim that he will be denied due process in the Soviet Union, the jurisdiction of this court obviously does not extend beyond the borders of the United States. It is well established that the federal judiciary may not require that persons removed from the United States be accorded constitutional due process. *See Jhirad v. Ferrandina*, 536 F.2d 478, 484-85 (2d Cir. 1976).

We are not, however, deaf to Linnas' protestations concerning the fate which may await him in the Soviet Union. In *Gallina v. Fraser* this court permitted the extradition of a man convicted *in absentia* in a foreign country. 278 F.2d 77, 78-79 (2d Cir.), *cert. denied*, 364 U.S. 851 (1960). The *Gallina* court hypothesized, however, that there could arise a situation in which the person to be removed from the United States would be subjected to "procedures or punishment so antipathetic to a federal

court's sense of decency" as to require judicial intervention. *Id.* at 79. This is not such a case.

The foundation of Linnas' due process argument is an appeal to the court's sense of decency and compassion. Noble words such as "decency" and "compassion" ring hollow when spoken by a man who ordered the extermination of innocent men, women and children kneeling at the edge of a mass grave. Karl Linnas' appeal to humanity, a humanity which he has grossly, callously and monstrously offended, truly offends this court's sense of decency.

Finally, we turn to Linnas' equal protection argument. The essence of that argument appears to be that Congress should not be permitted to treat Nazi war criminals differently from anyone else.

Nazi war criminals are not a class of persons entitled to enhanced scrutiny under the equal protection clause. The legislative system of excluding and deporting such persons will, therefore, "not be set aside as the denial of equal protection of the laws if any state of facts reasonably may be conceived to justify it." *Metropolitan Casualty Insurance Company v. Brownell*, 294 U.S. 580, 584 (1935); *Green v. Board of Elections of City of New York*, 380 F.2d 445, 451 (2d Cir. 1967) (Friendly, J.), *cert. denied*, 389 U.S. 1048 (1968). The rationality standard is not a difficult standard to meet. In this instance, we are convinced that a rational relationship exists between the deportation of Nazi war criminals and a legitimate legislative purpose. Petitioner's equal protection argument is, therefore, without merit.

CONCLUSION

The petition for review is denied.

Opinion of the Board of Immigration Appeals, dated October 16, 1985

United States Department of Justice
Executive Office for Immigration Review
Board of Immigration Appeals
Falls Church, Virginia 22041

October 16, 1985

File: A8 085 626 - New York

In re: KARL LINNAS

IN DEPORTATION PROCEEDINGS

APPEAL

ON BEHALF OF RESPONDENT:
Ivars Berzins, Esquire
484 West Montauk Highway
Babylon, New York 11702

ON BEHALF OF SERVICE:
Jeffrey N. Mausner
Aron A. Golberg
Trial Attorneys

ORAL ARGUMENT: June 27, 1985

CHARGE:

Order:
Sec. 241(a)(1), I&N Act [8 U.S.C. § 1251(a)(1)] - Excludable at entry under sections 2, 10, and 13 of the Displaced Persons Act of 1948

Sec. 241(a)(2), I&N Act [8 U.S.C. § 1251(a)(2)] - Entered in violation of sections 2, 10, and 13 of the Displaced Persons Act of 1948

Sec. 241(a)(19), I&N Act [8 U.S.C. § 1251(a)(19)] - Participation in Nazi persecution

APPLICATION: Designation of country of deportation

BY: Milhollan, Chairman; Maniatis, Dunne, Morris, and Vacca, Board Members

This is a case we previously heard on appeal and remanded to the immigration judge for designation of a country of

deportation pursuant to section 243(a) of the Immigration and Nationality Act, 8 U.S.C. § 1253(a) (1982). It is before us again by means of an appeal filed by the respondent challenging the immigration judge's decision of April 9, 1985, designating the U.S.S.R. as the country of deportation. For the reasons stated herein, we affirm the immigration judge's designation and shall dismiss the appeal.

The pertinent facts are as follows. The respondent is a 66-year-old male who is a native of Estonia, one of the three Baltic states that were annexed by the Soviet Union after the defeat of Germany in World War II. He entered the United States after the war, and in 1960 he became a naturalized citizen of this country. In 1979, the respondent was denaturalized on the grounds that he had illegally procured his citizenship by failing to disclose the fact that he had served at a concentration camp in Estonia under the direction of the Nazis during World War II. The Immigration and Naturalization Service subsequently instituted deportation proceedings against the respondent charging him with various grounds of deportability, among which was deportability pursuant to section 241(a)(19) of the Act, 8 U.S.C. § 1251(a)(19), for having assisted the Nazis in persecuting others because of their race, religion, national origin, or political opinion. The respondent was found by the immigration judge to be deportable as charged and was ordered deported to the U.S.S.R. On July 31, 1984, we affirmed the finding of deportability and, on the basis of that finding, concluded the respondent is statutorily ineligible for various forms of relief from deportation, including asylum and withholding of deportation from the U.S.S.R. However, in light of the respondent's contention that deportation of a native of Estonia to the U.S.S.R. would violate United States foreign policy, which has never recognized the legitimacy of the Soviet Union's annexation of Estonia, we remanded the case to the immigration judge to reconsider the issues raised by selection of the U.S.S.R. as the country of deportation. Pursuant to our order, the immigration judge conducted additional hearings between October 1984 and March 1985, at which both the respondent and the Service presented additional evidence on the question of the proper country of deportation.

Opinion of the Board of Immigration Appeals, dated October 16, 1985

On April 9, 1985, the immigration judge issued a new decision designating the U.S.S.R. as the country of deportation pursuant to provisions in the Act authorizing deportation to the country in which an alien's place of birth is situated at the time he is ordered deported or to any country that is willing to accept an alien into its territory. *See* section 243(a)(4) and (7) of the Act. The respondent thereupon filed this appeal.

Section 243(a) of the Act sets forth, in order of priority, three steps for designating a country of deportation. Step #1 provides that an alien himself may designate a country of deportation. If an alien declines to make a proper designation, or if the government of the country an alien designates is unwilling to accept him, or if the designation is prejudicial to the United States, then step #2 authorizes the Attorney General to deport an alien to any country of which he is a subject, national, or citizen, so long as the government of that country is willing to acept him into its territory. If deportation cannot be accomplished under this step then step #3 authorizes the Attorney General to deport an alien to any one of the following seven categories of countries without priority as to their order: (1) the country from which the alien last entered the United States; (2) the country in which is located the foreign port at which the alien embarked for the United States; (3) the country in which the alien was born; (4) the country in which the place of the alien's birth is situated at the time he is ordered deported; (5) any country in which the alien resided prior to entering the country from which he entered the United States; (6) any country that had sovereignty over the alien's birthplace at the time of his birth; or (7) if deportation to the foregoing is impracticable, inadvisable, or impossible, then to any country that is willing to accept the alien into its territory. Section 243(a)(1)-(7) of the Act; *Ng Kam Fook v. Esperdy*, 320 F.2d 86, 87-88 (2d Cir. 1963); *Matter of Lau*, 12 I&N Dec. 573, 574-75 (BIA 1968).

At both his original deportation hearing and upon remand to the immigration judge, the respondent designated the "free and independent Republic of Estonia" as his choice for a place of deportation under the first step of Section 243(a), contending

that since the Republic of Estonia is currently occupied by the U.S.S.R., he should be sent to offices maintained by the Republic of Estonia in New York City. Since the respondent is required to designate a "country" as the place of deportation under step #1 of section 243(a), his choice raises the issue of whether offices maintained on behalf of the Republic of Estonia in New York City constitute a "country" within the meaning of the first step of section 243(a).

Initially, we note that there is authority for the position that such offices may come within the meaning of the term "country" for purposes of determining a proper place of deportation. During World War II, in *Delany v. Moraitis*, 136 F.2d 129 (4th Cir. 1943), the United States Court of Appeals for the Fourth Circuit held that the Greek government-in-exile located in England was the proper place of deportation for an alien, pursuant to a statutory provision authorizing deportation to the "country" whence the alien came. The alien in question was a native of Greece which, at the time, was under German domination, and the Greek government-in-exile in England was recognized by the United States as the *de jure* government of Greece. The Fourth Circuit construed the term "country" to mean not only a particular geographical territory but the recognized state or sovereign that exercises power in international matters on behalf of the nationals of that territory, and therefore concluded that the Greek government-in-exile was a "country" for purposes of designating a place of deportation. *Id.* at 130-31. Two months after the decision in *Delany v. Moraitis*, however, Congress amended the staatutory provision in question to expressly provide that during time of war an alien who was a subject or citizen of a country with a recognized government-in-exile could be deported to the country in which the government-in-exile was located.[1] This alternative provision for selecting a country of

[1] Section 20 of the Immigration Act of 1917, 39 Stat. 874, 890, (repealed 1952) was amended by the Act of July 13, 1943, 57 Stat. 553 to include, in pertinent part, the following language:

(Footnote continued on following page)

deportation in cases involving a government-in-exile was carried over into the Act and currently appears in section 243(b).[2] We conclude that Congress' creation and continued use of an alternate provision for designating a place of deportation in cases involving a government-in-exile supersedes the Fourth Circuit's decision in *Delany v. Moraitis*. Therefore, to the extent that the case stands for the proposition that the term "country" can be construed to encompass a government-in-exile, it is no longer effective law.

> If the United States is at war and the deportation, in accordance with the preceding provisions of this section, of any alien who is deportable under any law of the United States, shall be found by the Attorney General to be impracticable or inconvenient because of enemy occupation of the country whence such alien came or wherein is located the foreign port at which he embarked for the United States or because of other reasons connected with the war, such alien may, at the option of the Attorney General, be deported (a) if such alien is a citizen or subject of a country whose recognized government is in exile, to the country wherein is located that government in exile, if that country will permit him to enter its territory; . . . .

[2] Section 243(b) of the Act, 8 U.S.C. § 1253(b), provides, in pertinent part, as follows:

> If the United States is at war and the deportation, in accordance with the provisions of subsection [243] (a), of any alien who is deportable under any law of the United States shall be found by the Attorney General to be impracticable, inadvisable, inconvenient, or impossible because of enemy occupation of the country from which such alien came or wherein is located the foreign port at which he embarked for the United States or because of reasons connected with the war, such alien may, in the discretion of the Attorney General, be deported as follows:
>
> > (1) If such alien is a citizen or subject of a country whose recognized government is in exile, to the country in which is located that government in exile if that country will permit him to enter its territory; . . . .

More recent cases have construed the term "country," as it is used to describe a place of deportation in section 243(a) of the Act, to have different meanings depending upon the context in which the term is used.[3] In context of step #2 of section 243(a), the Second Circuit, the circuit in which the respondent's case arises, has construed the term "country" to mean a foreign territory that is under the control of a *de jure* government recognized by the United States. *Ng Kam Fook v. Esperdy, supra*, at 88-89, citing *United States ex rel. Tom Man v. Murff*, 264 F.2d 926, 928 (2d Cir. 1959).[4] In the context of step #3 of section 243(a), however, the Second Circuit has construed the term "country" to mean merely a foreign territory that has a government with authority to accept a deportable alien. *Chan Chuen v. Esperdy*, 285 F.2d 353 (2d Cir. 1960) (per curiam); *United States ex rel. Tom Man v. Murff, supra*, at 928; *United States ex rel. Leong Choy Moon v. Shaughnessy*, 218 F.2d 316 (2d Cir. 1954).[5] Under the latter

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[3] The term "country" has also been construed to have different meanings depending upon whether the term describes a place of deportation for purposes of exclusion proceedings under section 237(a) of the Act, 8 U.S.C. § 1227(a) (amended 1981), or a place of deportation for purposes of deportation proceedings under section 243(a) of the Act. *See United States ex rel. Tom We Shung v. Murff*, 176 F. Supp. 253, 257-58 (S.D.N.Y. 1959), *aff'd*, 274 F.2d 667 (2d Cir. 1960) (per curiam). Since we are construing the term for purposes of section 243(a), we are not bound by the construction given to the term under section 237(a). *See United States ex rel. Tom We Shung v. Murff, supra.*

[4] This is consistent with the construction that other courts and we have given to the term as it is used in the second step of section 243(a). *Cheng v. INS*, 521 F.2d 1351 (3d Cir. 1975), *cert. denied*, 423 U.S. 1051 (1976); *Lee Wei Fang v. Kennedy*, 317 F.2d 180 (D.C. Cir.), *cert. denied*, 375 U.S. 883 (1963); *Matter of Cheung*, 16 I&N Dec. 690 (BIA 1979); *Matter of S-Y-L-*, 9 I&N Dec. 575 (BIA 1962).

[5] This, too, is consistent with the position in other circuits. *See, e.g., Ying v. Kennedy*, 292 F.2d 740 (D.C. Cir.), *cert. denied*, 368 U.S. 914 (1961); *Rogers v. Cheng Fu Sheng*, 280 F.2d 663 (D.C. Cir.), *cert. denied*, 364 U.S. 891 (1960). We have not yet fully resolved the issue of whether a "country" for purposes of the third step section 243(a) must have a government recognized by the United States. *Compare Matter of Neisel*, 10 I&N Dec. 57 (BIA 1962) *with Matter of Fwu*, 17 I&N Dec. 354 (BIA 1980).

construtions, it is immaterial whether the foreign government with jurisdiction over a territory is recognized by the United States, whereas under the former construction, official recognition by the United States is required. *Compare Ng Kam Fook v. Esperdy, supra, with United States ex rel. Leong Choy Moon v. Shaughnessy, supra.*

We need not decide which of these two constructions pertains to step #1 of section 243(a) in order to determine whether the respondent has properly designated the offices of the Republic of Estonia as a "country." The case law discussed above shows that under either construction the term "country" has been understood, at a minimum, to mean a foreign place with "territory" in a geographical sense and a "government" in the sense of a political organization that exercises power on behalf of the people subjected to its jurisdiction. *See Chan Chuen v. Esperdy, supra; NG Kam Fook v. Esperdy, supra; United States ex rel. Tom Man v. Murff, supra; United States ex rel. Leong Choy Moon v Shaughnessy, supra.* Indeed, section 243(a) of the Act clearly contemplates that these are essential aspects of a "country," for the language of that section expressly requires, or has been construed to require, that the "government" of a country selected under any of the three steps must indicate it is willing to accept a deported alien into its "territory." Section 243(a) of the Act; *United States ex rel. Tom Man v. Murff, supra,* at 928.

The respondent has not shown that the offices he designated under step #1 of section 243(a) satisfy these two prerequisites for a "country." The respondent's attorney has characterized the offices in New York as either a consulate or an embassy maintained in behalf of the Republic of Estonia. Under principles of international law, a foreign mission is not considered to be the territory of the sending state; rather, it is considered to be within the territory of the receiving state. *See McKeel v. Islamic Republic of Iran,* 722 F.2d 582, 588 (9th Cir. 1983). Therefore, the offices designated are a part of the United States and are not a foreign "territory." *Id.* Moreover, these offices have not been shown to possess, or constitute, a government. *See United States ex rel. Kusman v. District Director,* 117 F. Supp. 541, 546 (S.D.N.Y.

1953). Since the offices designated by the respondent do not qualify as a "country," he has not made a proper designation under step #1 of section 243(a), and we must proceed to the second step in that section.

The directive in step #2 that an alien is to be deported to the country of which he is a subject, national, or citizen, has been construed by the Second Circuit to refer to the country to which an alien owes allegiance. *Ng Kam Fook v. Esperdy, supra*, at 89. This construction is based primarily upon the Second Circuit's conclusion that the words "subject," "national," and "citizen" are synonymous terms describing an individual who owes allegiance to a particular government or political state. *Id.*[6] At his original hearing and on remand the respondent insisted that the only

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[6] In 1963, when the Second Circuit construed the meaning of the second step in section 243(a), the language of that provision expressly authorized deportation to the country of which an alien was a "subject national, or citizen." *See* Immigration and Nationality Act, Pub. L. No. 82-414, Title II, ch. 5, § 243(a), 1952 U.S. Code Cong. & Ad. News 166, 212. In 1981, however, Congress amended section 243(a), inserting a comma between the words "subject" and "national," thereby making them two separate terms. Immigration and Nationality Act Amendments of 1981, Pub. L. No. 97-116, § 18(i), 95 Stat. 1611, 1620 (codified as amended at 8 U.S.C. § 1253(a) (1982)). This amendment was intended merely to correct an error in punctuation in the Act as originally published. H.R. Rep. No. 264, 97th Cong., 1st Sess. 34, *reprinted in* 1981 U.S. Code Cong. & Ad. News 2577, 2603. Indeed, prior to 1952, our immigration laws had contained an identical provision authorizing deportation to "any country of which . . . an alien is a subject, national, or citizen." Section 20 of the Immigration Act of 1917, 39 Stat. 874, 890, *amended by* the Subversives Activities Control Act of 1950, § 23, 64 Stat. 987 (repealed 1952). Therefore, since the amendment made by Congress in 1981 was merely to correct an error in punctuation rather than to effectuate a substantive change in the law, we do not consider the amendment to have affected the validity of the Second Circuit's construction in *Ng Kam Fook v.. Esperdy, supra*. Moreover, to read "subject" as a term that is essentially synonymous with the words "national" and "citizen" in describing an individual who owes allegiance to a state is consistent with the meaning that traditionally has been accorded to the term "subject." *See* Borchard, *Diplomatic Protection of Citizens Abroad*, 11 Colum. L. Rev. 231 (1911); Coudert, *Our New Peoples, Citizens, Subjects, Nationals or Aliens*, 3 Colum. L. Rev. 13 (1903); 3 C. Gordon & H. Rosenfield, *Immigration Law and Procedure* § 11.3b (rev. ed. 1985).

country to which he now owes allegiance is the "free and independent Republic of Estonia." Since we have already determined that the offices of the Republic of Estonia do not constitute a "country" within the meaning of section 243(a), these offices are not a proper place of deportation under step #2. Moreover, although the Soviet Union has annexed Estonia and now exercises *de facto* jurisdiction over it, the respondent steadfastly rejects any allegiance to the U.S.S.R. Therefore, the Soviet Union is not a country of which the respondent is a "subject, national, or citizen." *Ng Kam Fook v. Esperdy, supra*. Since there is no country that fullfills step #2 of section 243(a), we must proceed to the last step in order to determine a proper place of deportation for the respondent.

Under subsection (7), step #3, of section 243(a), we are authorized to order the respondent's deportation to any country that is willing to accept him. An affidavit and letters submitted by counsel for the Service on remand show that Canada and West Germany are not willing to accept the respondent but that the U.S.S.R. is willing to do so. The Service has also submitted an affidavit from a legal advisor in the Department of State declaring that the respondent's deportation to the U.S.S.R. pursuant to subsection (7) of section 243(a) would not contravene our country's longstanding refusal to recognize the legitimacy of the Soviet annexation of Estonia. Since no other country is willing to accept the respondent, we conclude that the U.S.S.R. is a proper country of deportation for him.[7]

The respondent has argued, however, that the immigration judge erred by failing to consider all of the evidence the respondent submitted pertaining to the effect of his deportation to the U.S.S.R. upon our foreign policy. The respondent's evidence consists of testimony and letters from various persons such as former officials and residents of the Baltic states, the Consul General of Estonia, and the Charges d'Affaires of Lithuania and Latvia,

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[7] Our designation of the U.S.S.R. pursuant to section 243(a)(7) of the Act moots the respondent's argument on appeal that the immigration judge erred in relying on section 243(a)(4) as authority for selecting the Soviet Union.

expressing the opinion that deportation of a native of Estonia to the U.S.S.R. would violate United States foreign policy and would deal a harsh blow to the citizens of the Baltic states currently living under Soviet domination. Since the Department of State is the agency in our Government with the responsibility for formulating our foreign policy, we consider its opinion to be the only one that is relevant to the issue of whether the respondent's deportation to the U.S.S.R. would violate United States foreign policy. Therefore, the respondent's evidence on this issue was irrelevant. Moreover, since this is the case, the respondent's argument that his witnesses should have been allowed to present the official positions of various Baltic emigrant organizations has no merit whatsoever.

Furthermore, we consider the affidavit from the Department of State to be sufficient proof of the Government's position on the foreign policy implications of the respondent's deportation to the U.S.S.R. Thus, there was no need to solicit the testimony of various Government officials on this issue and, contrary to the respondent's argument on appeal, we conclude that the immigration judge acted reasonably in refusing a request to subpoena Government officials. Lastly in this regard, we reject the respondent's contention that by considering the State Department's position we have failed to exercise our discretion to choose among the seven categories of countries listed in step #3 of section 243(a). Our conclusion that the U.S.S.R. is a proper country of deportation is made with knowledge of the State Department's position but is not dictated by the position. Rather, as we indicated, *supra*, we have chosen the Soviet Union based upon the facts of the respondent's case, most particularly the fact that the U.S.S.R., and no other country, has indicated a willingness to accept the respondent into its territory. Accordingly, we have not failed to exercise our discretion in this matter. *See Accardi v. Shaughnessy*, 347 U.S. 260 (1954).

The respondent also has argued that it is unconstitutional for us to designate the U.S.S.R. because his expulsion to that country will, in effect, deprive him of his life without due process of law. This argument rests on the respondent's contention that

he has been sentenced to death by firing-squad in the U.S.S.R., as the result of a sham war-crimes trial held in absentia, in which his conviction and sentence were preordained by Soviet authorities.

To prove this contention the respondent attempted to introduce, on remand, translated excerpts from a Soviet legal journal reporting the facts of the respondent's 1961 conviction and an affidavit from a person alleged to be an expert on Soviet law, expressing the opinion that the respondent's trial was a sham. The immigration judge did not accept these materials as evidence, and the respondent has argued that he was thereby precluded from presenting material evidence about the fundamental unfairness of his Soviet conviction and his deportation to the U.S.S.R. We note that the record of the respondent's original deportation proceeding already contains at least one law review article about the respondent's Soviet trial (Exh. 15, January 12, 1983). That article discusses the respondent's trial as a notorious example of Soviet justice, recounting the fact that a Soviet legal journal reported the evidence and events of the respondent's trial, along with the fact of his conviction and the nature of his sentence, before the trial ever commenced. Since this article is already in the record, the additional materials the respondent wished to submit were merely cumulative and the immigration judge did not abuse his discretion in refusing to admit them into evidence.

Although the respondent has been sentenced to death in the Soviet Union in what appears to have been a sham trial, the Constitution does not extend beyond our borders to guarantee the respondent fairness in judicial proceedings in the Soviet Union. Moreover, under our immigration laws there is no requirement that a foreign conviction must conform to our constitutional guarantees. *See, e.g., Brice v. Pickett*, 515 F.2d 153, 154 (9th Cir. 1975); *Matter of Awadh*, 15 I&N Dec. 775, 777 (BIA 1976). Thus, due process is not violated by the respondent's deportation to the U.S.S.R.

We are bound by law to designate a country of deportation and the U.S.S.R. is a proper country under section 243(a)(7) of

the Act. Accordingly, we affirm the designation of the U.S.S.R. and shall dismiss the respondent's appeal.

ORDER: The appeal is dismissed.

Chairman

Opinion of the Immigration Judge, dated April 9, 1985

United States Department of Justice
Executive Office for Immigration Review
26 Federal Plaza
New York, N.Y. 10278

April 9, 1985

File: A8 085 626

In the Matter of)
Karl Linnas) *IN DEPORTATION PROCEEDINGS*
Respondent)

On Behalf of Respondent:

Ivars Berzins, Esq.
484 W. Montauk Hghwy
Babylon, N.Y. 11702

On Behalf of Service:

Office of Special Investigations
by Jeffrey Mausner, Esq.
of Counsel
Aaron Goldberg, Esq.
of Counsel

DECISION OF THE IMMIGRATION JUDGE

The Board of Immigration Appeals on July 31, 1984 remanded on the issue of country of deportation.

Section 243(a) of the Immigration and Nationality Act ("Act") provide for a three step process for accomplishing deportation:

> Step 1 is to seek deportation to any country properly designated by the respondent — the respondent designated the Republic of Estonia. The Offices of the free Republic of Estonia is in the United States. Deportation must be to a country which has been defined as any place possessing a government with authority to accept an alien deported from the United States. *Chan Chuen v. Esperdy* 285 F 2d 353 (CA 21960).
>
> Under the circumstances, seeking deportation to the Republic of Estonia would be a nugatory act and would be fruitless.

Opinion of the Immigration Judge, dated April 9, 1985

> Step 2 is reached when Step 1 cannot result in deportation to any country of which the deportee is a national or citizen — The respondent claims that he is a citizen of the Republic of Estonia. However, the Republic of Estonia does not constitute a country of deportation within the meaning of Section 243(a) of the Act. *Chan Chuen v. Esperdy*, supra.
>
> Step 3 is reached when neither of the first two steps is productive. Section 243(a) of the Act setsforth seven categories of countries without giving any priority or preference because of the order as setforth: - See *Matter of Chow*, 10 I&N Dec. 469(BIA 1964).
>
> (4) to the country in which the place of his birth is situated at the time he is ordered deported.
>
> (7) if deportation to any of the foregoing places or countries is impracticable, inadviable, or impossible, then to any country which is willing to accept such alien into its territory.

At the original deportation hearing I designated the USSR under paragraph (4) above. I believe it is still a proper designation in view of the obvious failure of steps 1 and 2. It has been decided that deportation can be to acountry succeeding to the sovereignty of a district where alien resided and from which he came. See *Seif v. Nagle*, 14 F2d 416 (CA 9 1926).

The Board remanded to determine the reasonableness of the designation of the USSR so that I may consider the implications of the United States refusal to recognize the Soviet annexation of Estonia. The respondent presented several witnesses who testified that the nonrecognition policy of this country would be jeopardized by deporting an emigree from any of the Baltic states. (Luthuania, Lativia and Estonia) including Estonia. They reasoned that the nonrecognition policy was more important to the morale of Baltic emigrees in this country and persons presently residing there, than deporting an alleged war criminal in violation of said policy. However, Davis R. Robinson, the Legal

Advisor of the Department of State submitted an affidavit (Attachment 4 - Exhibit R3) wherein he stated .... "the deportation of Mr. Linnas under 8 USC 1253(a)(7) to a place which we regard as within the territory of the USSR would not as a matter of law contravene the longstanding and firmly held United States policy of nonrecognition of the forcible incorporation of Estonia into the USSR." This judg ment is in variance with Professor Aun's analysis of "nonrecognition" (Exh R-11). The latter confused extradition vis-a-vis deportaton. In addition his comments concern a foreign policy decision of the United States and as such I choose to follow the Legal advisor of the Department of State.

The respondent also claimed that his due process rights will be violated by returning him to the USSR where he has been sentenced to death in absentia. I cannot find that either procedural or substantive due process was denied to the respondent. With respect to procedural due process the Supreme Court in *Landon v. Plasencia*, 459 US 21, 32 (1982) held that an alien is entitled to a full and fair deportation hearing. No claim has been made that the hearing was neither full nor fair.

His claim that the conviction in absentia (Ex R-7) lacked due process begs the question. There is no lack of due process in the United States by designating as a country of deportation a place where by our standards, due process may have been violated. The respondent was unable to find any statutory basis for a finding of a denial of substantive due process. The contrary is evident by the process of designating the USSR under section 243(a) of the Act.

In view of the USSR's willingness to accept the respondent as a deportee I redesignate the USSR as the country of deportation under step 3 – paragraph 4 or 7.

IT IS SO ORDERED

/s/ Howard I. Cohen

HOWARD I. COHEN
Immigration Judge

Opinion of the Board of Immigration Appeals, dated July 31, 1984

United States Department of Justice
Executive Office for Immigration Review
Board of Immigration Appeals
Falls Church, Virginia 22041

File: A8 085 626 - July 31, 1984

In re: KARL LINNAS

IN DEPORTATION PROCEEDINGS

APPEAL

ON BEHALF OF RESPONDENT:
Ivars Berzins, Esquire
484 W. Montauk Highway
Babylon, New York 11702

ON BEHALF OF SERVICE:
Neal M. Sher
Acting Director

Jeffrey N. Mauser
Trial Attorney
Office of Special Investigations
Criminal Division
United States Department of Justice

ORAL ARGUMENT: September 8, 1983

CHARGE:

Order:
Sec. 241(a)(1), I&N Act [8 U.S.C. 1251(a)(1)] - Excludable at entry under sections 2, 10, and 13 of the Displaced Persons Act of 1948

Sec. 241(a)(2), I&N Act [8 U.S.C. 1251(a)(2)] - Entered in Violation of Sections 2.10 and 13 of the Displaced Persons Act of 1948.

Sec. 241(a)(19), I&N Act [8 U.S.C. 1251(a)(19)] - Participation in Nazi persecution

APPLICATION: Termination of proceedings; waiver of deportability; suspension of deportation; asylum; withholding of deportation; voluntary departure

Opinion of the Board of Immigration Appeals, dated July 31, 1984

In this appeal the respondent challenges the immigration judge's May 19, 1983 decision finding the respondent deportable as charged and denying him relief from deportation. We affirm the immigration judge's decision in substantial part.

The respondent is a 65-year-old male who is a native of Estonia.[1] He entered the United States in 1951 as an immigrant pursuant to the Displaced Persons Act of 1948, Pub. L. No. 80-774, ch. 647, 62 Stat. 1009, as amended ("the DPA"). In 1960 he became a naturalized citizen of the United States.

In 1979 the Government brought a denaturalization action against the respondent in the United States District Court for the Eastern District of New York. *See United States v. Linnas*, 527 F.Supp. 426 (E.D.N.Y. 1981). The Government alleged that the respondent illegally procured his citizenship because he failed to disclose at the times of his admission and naturalization that he had been a member of the Selbstschutz, an Estonian Organization which aided the Nazis during World War II, and had served as a member of the security forces at a concentration camp in Tartu, Estonia. *Id.* The district court found in favor of the Government and entered a judgment of denaturalization revoking the respondent's citizenship and cancelling his certification of naturalization. *Id.* The United States Court of Appeals for the Second Circuit affirmed the judgment of denaturalization and the United States Supreme Court decined to review the matter. (Government's Exh. 5 and 5A).

On June 25, 1982, the Immigration and Naturalization Service commenced deportation proceedings against the respondent charging him with deportability: (1) pursuant to section 241(a)(1) of the Immigration and Nationality Act, 8 U.S.C. 1251(a)(1), as an alien who was excludable under sections 2, 10, and 13 of the DPA at the time of entry; (2) pursuant to section 241(a)(2) of the Act, 8 U.S.C. 1251(a)(2), as an alien who entered the United States in violation of sections 2, 10, and 13 of the DPA; and

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[1] After the defeat of Germany in World War II, the Soviet Union annexed the Baltic State of Estonia, along with Latvia and Lithuania. *See Matter of Laipenieks*, Interim Decision 2949 (BIA 1983). The United States has never recognized the legitimacy of that annexation. *Id.*

(3) pursuant to 241(a)(19) of the Act, 8 U.S.C. 1251(a)(19), an an alien who assisted the Nazi government of Germany in the persecution of persons because of their race, religion, national origin, or political opinion during the period between March 23, 1933 and May 8, 1945.

At the deportation hearing held before the immigration judge the respondent denied the charges of deportability.[2] To prove its case the Service relied entirely upon the testimony, exhibits, and judgment in the denaturalization case, all of which were admitted into evidence by the immigration judge. In defense of the Service's charges, the respondent submitted various pleadings and memoranda from the denaturalization proceeding. The respondent argued that he was eligible for the statutory waiver of deportability available in section 241(f) of the Act, 8 U.S.C. 1251(f) and, contending that he faced execution before a firing-squad if deported to the U.S.S.R., he also applied for the following forms of relief from deportation; asylum pursuant to section 208 of the Act, 8 U.S.C. 1158; withholding of deportation to the U.S.S.R. pursuant to section 243(h) of the Act, 8 U.S.C. 1253(h); suspension of deportation pursuant to section 244(a) of the Act, 8 U.S.C. 1254(a); voluntary departure pursuant to section 244(e) of the Act, 8 U.S.C. 1254(e); and adjustment of status pursuant to section 245 of the Act, 8 U.S.C. 1255. In the event he was found deportable, the respondent designated the Republic of Estonia as the country to which he wished to be deported.

In a written decision dated May 19, 1983, the immigration judge applied the doctrine of collateral estoppel to the factual and legal issues resolved by the denaturalization judgment to find the respondent deportable as charged and ineligible for relief from deportation. The immigration judge ordered the respondent

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[2] The deportation hearing was held over the course of five days: October 27, 1982, December 2, 1982, January 17, 1983, January 19, 1983, and April 28, 1983. The respondent appeared in person only at the December 2nd hearing in order to be present when his attorney answered the Service's allegations and charges. The respondent specifically waived his appearance at the October 27th and January 17th hearings, and at the January 19th hearing he attested, by phone, to his desire to apply for various forms of relief from deportation.

deported to Estonia, designating the U.S.S.R. as the country of deportation in the event Estonia refused to accept him. In a timely appeal the respondent has challenged the immigration judge's use of collateral estoppel to establish deportability and ineligibility for relief from deportation.

THE LEGAL EFFECT OF THE JUDGMENT IN THE DENATURALIZATION PROCEEDING

In order for the judicially-developed doctrine of collateral estoppel to be applied in a deportation proceeding there must have been a prior judgment between the parties that is sufficiently firm to be accorded conclusive effect and the parties must have been accorded a full and fair opportunity to litigate the issues in the prior suit. *Matter of Fedorenko*, Interim Decision 2963 (BIA 1984). In addition, the use of collateral estoppel must not be unfair to the parties. *Id.*

These prerequisites are satisifed in the respondent's case. The district court's denaturalization judgment is a final judgment and may be accorded conclusive effect because it was affirmed by the court of appeals and was denied review by the Supreme Court. In addition, because the denaturalization proceeding was before a federal district court and subject to the strict judicial rules of evidence, the respondent was given a full and fair opportunity to litigate the issues in his case. We also find it fair to apply collateral estoppel in this proceeding. The respondent and the United States, who were the parties in the denaturalization proceeding, are also the parties in this proceeding, and the Government's burden of proof in the denaturalization proceeding was the same as its burden in this proceeding. *See Woodby v. INS*, 385 U.S. 276, 285-86 (1966); *Matter of Fedorenko, supra*.[3] Moreover, both

[3] It is not the case, as the respondent contends, that the district court improperly shifted the burden of proof to him in the denaturalization proceeding. The district court's conclusion that the respondent failed to show the unreliability of evidence obtained from the U.S.S.R. reflects the respondent's failure to support his objections to the admissibility of evidence; it does not constitute a shifting of the ultimate burden of proof. *See U.S. v. Linnas, supra*, at 431-34.

the respondent and the Government reasonably could have foreseen that issues raised in the denaturalization proceeding might be raised in a subsequent deportation proceeding.[4]

The respondent has argued against application of the doctrine of collateral estoppel on the ground that the denaturalization proceeding did not provide him with a fair opportunity to ligitate the issues in his case. He has raised the following objections to that proceeding. First, the respondent contends his fifth amendment privilege against self-incrimination was violated because the district court imposed sanctions upon him for refusing to answer certain Government interrogatories and improperly relied upon uncertified evidence that he was convicted of war crimes *in absentia* in the U.S.S.R. *See U.S. v. Linnas, supra,* at 429. Secondly, he contends he was deprived of the opportunity to confront the witnesses against him because the Government was not required to pay for his attorney to attend depositions taken by the Government in the U.S.S.R. *See id.* at 434. Thirdly, he contends he was denied adequate discovery because the district court excused the Government from answering his interrogatories, withheld a list of Government witnesses from him, and denied his motion to depose the Soviet officials who participated in the trial against him in the U.S.S.R. Fourthly, he contends the district court improperly relied upon false evidence contained in four taped depositions of Soviet citizens, in which the deponents identify the repsondent as chief of the guards at Tartu concentration camp and place him in charge of several mass executions of Jews and non-Jews. The Second Circuit has already rejected the respondent's arguments, concluding that the question of a violation of his privilege against self-incrimination was moot, that the Soviet depositions and documentary evidence were properly admitted and considered by the district court, that the respondent

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[4] Several of the issues that were resolved by the outcome of the denaturalization judgment, such as issues pertaining to the respondent's inadmissibility under the DPA at the time he entered the United States and the issue of whether he assisted the Nazis in persecuting others, also pertain to grounds of deportability under the Act. *See, e.g.*, sections 241(a)(1), (a)(2), and (a)(19) of the Act and discussion *infra*, pp. 11-14.

was not entitled to Government funds to pay for his attorney's presence at the Soviet depositions, and that the district court did not abuse its discretion in rejecting the motion to depose Soviet officials. (*See* Government's Exh. 5A). We are bound by the Second Circuit's resolution of these issues. *Matter of Bowe*, 17 I&N Dec. 488, 490 (BIA 1980). Moreover, as we indicated, *supra*, we are convinced that the respondent received a full and fair opportunity to litigate the issues in the denaturalization proceeding. Thus, we reject his argument that it is not appropriate to apply collateral estoppel to the issues resolved by the denaturalization judgment.

(1) Findings of fact conclusively established by the denaturalization judgment.

Under the doctrine of collateral estoppel, the denaturalization judgment conclusively establishes the "ultimate facts" of this deportation proceeding, *i.e.*, those facts upon which the respondent's deportability and eligibility for relief from deportation are to be determined. *The Evergreens v. Nunan*, 141 *Matter of Fedorenko, supra*. There are three general categories of facts which we consider to be "ultimate" in this case. The first category consists of facts which pertain to the respondent's citizenship and nationality. These are "ultimate facts" because they are relevant to the issue of the respondent's alienage and thereby determine whether he is subject to the various deportation provisions of section 241(a) of the Act.[5] The second category consists of facts which pertain to the respondent's activities during World War II, and in particular to his activities at the Tartu concentration camp. These are "ultimate facts" because they determine the respondent's deportability under sections 241(a)(1), (a)(2), and (a)(19), for being excludable under, and for entering in violation of, the DPA and for assisting the Nazis in persecuting others. In addition, these facts are relevant to the respondent's eligibility for

[5] Section 241(a), which is the basis for the Service's charges of deportability, pertains only to an "alien." The term "alien" means any person who is not a citizen or national of the United States. Section 101(a)(3) of the Act, 8 U.S.C. 1101(a)(3).

various forms of relief from deportation. *See discussion, infra* pp. 14-15. The third category of "ultimate facts" consists of facts pertaining to the respondent's application for a visa under the DPA and his immigration to this country in 1951. These are "ultimate facts" because they, too, determine the respondent's deportability under sections 241(a)(1) and (a)(2). The following facts established by the denaturalization judgment come within one of these three categories:

The respondent was born in Tartu, Estonia, on August 6, 1919. *U.S. v. Linnas, supra,* at 429-30. In 1941, the Nazis occupied Estonia and, as part of their policy of exterminating Jews in the occupied territories, the Nazis established mobile killing units known as the "Einsatzkommandos". *Id.* at 430. The Einsatzkommandos accomplished their duties in Tartu with the assistance of the Estonian "Home Guard" or "Self-Help" forces, referred to as the "Selbstschutz" by the Germans and as the "Omakaitse" by the Estonians. *Id.* at 430, 431. The Selbstschutz carried out most of the arrests and executions of Jews in Estonia in order to minimize the public's awareness of the Nazis' plan for exterminating the Jews. *Id.* In Tartu over 1200 persons were arrested at the direction of the Nazis; the majority were taken into custody because they were suspected of communist activity. *Id.* at 431 n. 8. Of the 1200 people arrested, almost 300 were imprisoned at the concentration camp in Tartu, while another 405 were executed, included at least 50 Jews. *Id.* By mid-January, 1942, the Nazis achieved the goal of making Estonia "judenfrei" (free of Jews). *Id.* at 431.

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* There was considerable evidence in the denaturalization proceeding that the respondent also supervised several mass executions of Jewish and non-Jewish prisoners at a site outside Tartu. *Id.* at 431-34. This evidence consisted of taped depositions of Soviet witnesses whom the district court found to be credible. *Id.* at 434 n. 15. However, because of prejudicial language used by Soviet prosecutors during the depositions, the district court gave limited weight to the depositions, considering them only as corroborating evidence of the respondent's supervisory position at the concentration camp at Tartu. *Id.* at 434 n. 16. Since the district court gave limited weight to the Soviet depositions, we do not consider the respondent's participation in mass executions to be a finding of fact established by collateral estoppel.

In the fall of 1941, the respondent was an active, ranking member of the Selbstschutz in Tartu and occupied a supervisory role in the management at the concentration camp located at the Kuperjanov Barracks. *Id.* at 431, 434.[6] Sometime between 1942 and 1944, the respondent volunteered for membership in a Nazi-controlled security force in Tartu, and by 1944 he had become a member of the 38th Police Battalion which went into battle under the Nazis, in an effort to halt a Soviet counter-offensive. *Id.* at 435.

In 1948 the respondent's father began the process leading to the respondent's admission to the United States by filing an application for assistance with the Preliminary Commission for the International Refugee Organization. *Id.* at 437. The application represented that the respondent had been a student and technical artist in Estonia from 1940 through 1943. *Id.* Based on the information in this application, the respondent was certified by the International Refugee Organization as a refugee and a displaced person. *Id.* Subsequently, in seeking admission to this country as a refugee, the respondent knowingly and willfully misrepresented, both to members of the intelligence forces of the United States Army and in his visa application, the facts about his activities during World War II. *Id.* at 437, 439, and nn. 33, 34. On May 21, 1951, when examined about his admissibility to this country by an officer of the Service, the respondent twice falsely swore that he had never participated in the persecution of any person because of race, religion, or national origin. *Id.* at 438.

Since the foregoing facts found in the denaturalization proceeding are also "ultimate facts" in this case, we consider them to be conclusively established by operation of the doctrine of collateral estoppel. *The Evergreens v. Nunan, supra,* at 931; *Matter of Fedorenko, supra.*

(2) Matters of law conclusively resolved by the denaturalization judgment.

In the denaturalization proceeding the district court reached several conclusions of law which are material to issues in this proceeding. First, the district court concluded that the respondent

was excluded from the definition of a "displaced person" by section 2 of the DPA[7] and was ineligible for his visa under section 13 of the DPA[8] because he participated in the persecution of others. *U.S. v. Linnas, supra,* at 439 and n. 32. The district court also concluded that the respondent was inadmissible under section 10 of the DPA[9] because he knowingly and willfully misrepresented material facts about his participation in Nazi atrocities. *Id.* at 439 and nn. 33, 34.

The doctrine of collateral estoppel may be applied to preclude reconsideration of issues of law, as well as of fact, so long as the issues arise in both the prior and subsequent suits from virtually identical facts and there has been no change in the controlling law. *Matter of Fedorenko, supra.* These conditions are met in this case. The issues of the respondent's inadmissibility under sections 2, 10, and 13 of the DPA arise in this proceeding because the respondent is charged with deportability under sections 241(a)(1) and (a)(2) of the Act for entering this country in violation of the

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[7] Section 2 of the DPA defined those eligible for admission as a "displaced person" by reference to the definition of "refugee or displaced person" found in Annex I of the Constitution of the International Refugee Organization of the United Nations. *Fedorenko v. United States,* 449 U.S. 490, 495 nn. 3-4 (1981). That definition excluded the following classes: "any persons who . . . have assisted the emeny in persecuting civil populations of countries, members of the United Nations . . . ." *Id.* We note that the published version of the district court's opinion incorrectly attributes the definition of a "displaced person" to section 13 of the DPA. *U.S. v. Linnas,* at 439. However, the actual district court decision, which is part of the record in this proceeding, correctly attributes the definition to section 2 of the DPA, thus concluding that the respondent was excluded from the definition of a "displaced person" by section 2 of the DPA. (*See Government's Exh. 4*).

[8] Section 13 of the DPA, as amended in 1950, provided that no visa would be issued under the Act to "any person who advocated or assisted in the persecution of any person because of race, religion, or national origin . . . ." *U.S. v. Linnas, supra,* at 439 n. 32.

[9] Section 10 of the DPA placed the burden of proving eligibility as a "displaced person" on the person seeking admission and provided that "[a]ny person who shall wilfully make a misrepresentation for the purpose of gaining admission into the United States as an eligible displaced person shall thereafter not be admissible into the United States." *Fedorenko v. United States, supra,* at 495.

DPA. Moreover, the issues arrise in this proceeding out of the identical facts and the same principles of law that were considered by the district court.

The respondent argues, however, that collateral estoppel should not be applied to bar relitigation of his admissibility under sections 2, 10, and 13 of the DPA because the district court's resolution of these issues was not strictly "necessary" to the outcome of the denaturalization proceeding. His argument rests on the fact that the district court's judgment is based upon three separate and independent grounds: (1) the respondent was not lawfully admitted to the United States because he was inadmissible under section 2, 10, and 13 of the DPA; (2) the respondent lacked the requisite good moral character to become a citizen because he was voluntarily involved in atrocities against men, women, and children during World War II; and (3) the respondent procured his certificate of naturalization by willfully misrepresenting the material facts about his activities during World War II. *See U.S. v. Linnas, supra,* at 439-40.

In the Second Circuit, application of the doctrine of collateral estoppel is not to be abandoned merely because a prior judgment rested on multiple independent grounds. *Winters v. Lavine*, 574 F.2d 46 (2d Cir. 1978); *Williams v. Ward*, 556 F.2d 46 (2d Cir.), *cert. denied*, 434 U.S. 944 (1977). The controlling rule is that collateral estoppel should be applied whenever an issue was raised, litigated, and adjudged in a prior action, even if the court in the prior action determined two or more issues, each of which would have been sufficient to support the judgment.[10] *Winters v. Lavine, supra; Williams v. Ward, supra;* IB J. Moore, *Federal Practice and Procedure* ¶0.443, at 789-90 (2d ed. 1981). Thus, since the issues of the respondent's inadmissibility under sections

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[10] In at least one case, *Halpern v. Schwartz*, 426 F.2d 102 (2d Cir. 1970), the Second Circuit did refuse to apply collateral estoppel to a prior decision for the reasons urged by the respondent. The Second Circuit subsequently declined to follow *Halpern* on at least two occasions, however, *See Winters v. Lavine, supra; Williams v. Ward, supra.* Accordingly, we consider the controlling rule to be one which allows collateral estoppel to be applied to a prior judgment even it if rests on several independent grounds.

2, 10, and 13 of the DPA were raised, litigated, and adjudged in the denaturalization proceeding, the immigration judge properly applied collateral estoppel to bar relitigation of these issues. *Winters v. Lavine, supra; Williams v. Ward, supra.*

THE RESPONDENT'S DEPORTABILITY

The district court's conclusion that the respondent was excluded from the definition of a "displaced person" by section 2 of the DPA renders the respondent deportable pursuant to section 241(a)(1) of the Act as an alien who was excludable under the law at the time of his entry. Similarly, the district court's conclusions that the respondent was inadmissible under section 10 of the DPA and ineligible for his visa under section 13 of the DPA render the respondent deportable pursuant to section 241(a)(2) of the Act as an alien who is in the United States in violation of the law. Thus, given the conclusions of law established by collateral estoppel, the immigration judge correctly found the respondent deportable pursuant to sections 241(a)(1) and (a)(2) of the Act.

The question of the respondent's deportability pursuant to section 241(a)(19) of the Act was not actually litigated in the denaturalization proceeding and therefore collateral estoppel does not automatically resolve this issue. Nevertheless, the facts conclusively established by collateral estoppel show the respondent to be deportable pursuant to section 241(a)(19). That section provides for the deportation of aliens who --

> during the period beginning on March 23, 1933, and ending on May 8, 1945, under the direction of, or in association with --
>
> (A) the Nazi government of Germany,
>
> (B) any government in any area occupied by the military forces of the Nazi government of Germany,
>
> (C) any government established with the assistance or cooperation of the Nazi government of Germany, or

(D) any government which was an ally of the Nazi government of Germany,

ordered, incited, assisted, or otherwise participated in the persecution of any person because of race, religion, national origin, or political opinion.

The fact that the respondent's activities for the Selbstschutz occurred in 1941 shows that his conduct clearly falls within the period of time specified by section 241(a)(19). The elements of that section which are at issue are whether: (1) the respondent "assisted or otherwise participated in the persecution of any "person" (2) "because of religion or political opinion" and did so (3) "under the direction of, or in association with" the Nazi government of Germany.

(1) "Assisted or otherwise participated in the persecution of any person".

The term "persecution" as used in section 241(a)(19) contemplates the infliction of suffering or harm, under government sanction, upon persons who differ from others in the ways specified by the Act, *i.e.*, race, religion, national origin, or political opinion. *Matter of Laipenieks, supra.* The harm or suffering inflicted may take various forms but it most certainly includes physical confinement. *Id.* The facts established by collateral estoppel show that almost 300 persons were confined at the Tartu concentration camp as of 1941 either because they were Jews or because they were suspected of Communist activities. The imprisonment of the inmates of the Tartu camp clearly constitutes "persecution" of them within the meaning of section 241(a)(19). *Id. See also Matter of Fedorenko, supra.*

The respondent argues that the findings fo the district court are not sufficient to meet this element of section 241(a)(19) because the district court did not find the respondent was the commandant of the Tartu concentration camp or that he personally persecuted others. This argument ignores the provision in section 241(a)(19) which makes an alien deportable if he "assisted"

in the persecution of others. We have already held that the actions of a Ukrainian prisoner of war who was forced by the Nazis to guard the perimeter of a concentration camp constituted assistance in persecution within the meaning of section 241(a)(19) because his actions would have aided the Nazis, in some small measure, in their confinement of the prisoners of the camp. *Matter of Fedorenko, supra.* It follows, *a fortiori*, that the respondent's involvement in supervising the management of the Tartu concentration camp constituted assistance in persecution with the meaning of section 241(a)(19) because his actions would have significantly aided the Nazis in their confinement of the prisoners at the camp. *Id.*

(2) Persecution "because of religion . . . or political opinion."

The facts established by collateral estoppel show that the Nazis confined almost 300 persons at the Tartu concentration camp because they were suspected of having Communist sympathies or were Jewish. The respondent argues, however, that to come within section 241(a)(19) of the Act there must be a finding that he, himself, was motivated by religious or political prejudice and he correctly points out that there was no finding in the denaturalization proceeding about his motivations for joining the Selbstschutz. *See U.S. v. Linnas, supra*, at 431 n. 9. We have recently held, however, that an alien's motiviation and intent are irrelevant to the issue of his deportability under section 241(a)(19). *Matter of Laipenieks, supra; Matter of Fedorenko, supra.* The absence of a finding that the respondent had either religious or political motivations for his actions does not alter the fact that he "assisted" in physical persecution which occurred "because of" official policies directed against people of the Jewish religion and people with Communist sympathies. Thus, his conduct clearly constituted assistance in persecution "because of religion or . . . political opinion."

(3) "Under the direction of, or in association with" the Nazi government of Germany.

The facts established by collateral estoppel show that the respondent engaged in his activities at the Tartu concentration camp as a member of the Selbstschutz and that the Selbschutz was an Estonian organization which assisted the Nazis in their plan to arrest and execute Jews and Communists in Estonia. These findings clearly show that the respondent's activities at the Tartu concentration camp were "under the direction of, or in association with" the Nazi government of Germany.

The facts discussed above show clearly, unequivocally, and convincingly that in the fall of 1941, under the direction of, or in association with, the Nazi government of Germany, the respondent assisted in the persecution of persons because of their religion or political opinion. Thus, the immigration judge correctly found the respondent deportable pursuant to section 241(a)(19) of the Act.

The respondent argues that he may not be found deportable pursuant to section 241(a)(19) because it is an unconstitutional ex post facto law or bill of attainder. This argument lacks any merit whatsoever. *See Artukovic v. INS*, 693 F.2d 894 (9th Cir. 1982). It is well settled that the creation of a retroactive ground for deportation does not violate the ex post facto prohibition. *Marcello v. Bonds*, 349 U.S. 302, 314 (1955); *Galvan v. Press*, 347 U.S. 522, 531 (1954); *Harisiades v. Shaughnessy*, 342 U.S. 580, 594 (1952). That prohibition applies only to criminal statutes and deportation laws are civil, not criminal, in nature. *Id.* Moreover, the courts have rejected the argument that a deportation provision is an unconstitutional bill of attainder. *See e.g., MacKay v. McAlexander*, 268 F.2d 35 (9th Cir. 1959), *cert. denied* 362 U.S. 961 (1960); *Quattrone v. Nicolls*, 210 F.2d 513, 519 (1st Cir.), *cert. denied*, 347 U.S. 976 (1954). The constitutional prohibition against bills of attainder was intended to prevent legislative punishment and trial by legislature. *U.S. v. Brown*, 381 U.S. 437, 442-44 (1965). This is clearly not the effect of section 241(a)(19): deportation is not punishment, *Harisiades v. Shaughnessy, supra*,

at 594, and section 241(a)(19) does not deprive an alien of his right to a full evidentary hearing on the issue of his deportability, with the right to judicial review. *See* sections 106(a) and 242(b) of the Act, 8 U.S.C. 1105(a) and 1252(b).

THE RESPONDENT'S ELIGIBILITY FOR RELIEF FROM DEPORTATION

The respondent has argued that the immigration judge erred in finding him ineligible for a waiver of deportability under section 241(f), suspension of deportation under section 244(a), and voluntary departure under section 244(e). Under each of these sections of the Act, the particular relief afforded is unavilable to an alien who is deportable pursuant to section 241(a)(19) of the Act. *See* sections 241(f)(1)(A) and 244(a) of the Act, as amended by Publ. L. No. 97-116, §§8,18(h)(2), 95 Stat. 1611, 1616, 1620 (1981) (codified at 8 U.S.C. 1251(f)(1)(A) and 1254(a) respectively); section 244(e) of the Act, as amended by Pub. L. No. 95-549, §105, 92 Stat. 2065, 2066 (1978) (codified at 8 U.S.C. 1254(e)); *see also Matter of Laipeneiks, supra*. Since the respondent is deportable pursuant to section 241(a)(19), he is precluded as a matter of law from obtaining the relief sought and the immigration judge correctly denied the respondent's various applications.

The respondent has also argued that he is eligible for either a discretionary grant of asylum or for mandatory withholding of deportation to the U.S.S.R. By law, neither asylum nor withholding of deportation is available to an alien ". . . who ordered, incited, assisted, or otherwise participated in the persecution of any persons on account of race, religion, nationality, membership in a particular social group, or political opinion." *See* the definition of "refugee" in section 101(a)(42)(A) of the Act, 8 U.S.C. 1101(a)(42)(A), made applicable to claims for asylum by section 208 of the Act; *see also* section 243(h)(1) of the Act. The fact that in 1941 the respondent assisted the Nazis in persecuting the inmates of the Tartu concentration camp because of their religion or political opinion clearly excludes him from eligibility for asylum and withholding of deportation under the quoted provision. Thus, the immigration judge correctly denied the respondent that relief.

Opinion of the Board of Immigration Appeals, dated July 31, 1984

MISCELLANEOUS MATTERS

The respondent has argued that the Service should be estopped from seeking his deportation because Government attorneys in the denaturalization proceeding suppressed exculpatory evidence and failed to emphasize the unfairness of the Soviet trial in which he was sentenced to death for his actions under the Nazis. These are frivolous arguments. An estoppel can be invoked against the Government, if at all, only when Government conduct toward an alien amounts to "affirmative misconduct." *INS v. Miranda*, ____ U.S. ____, 103 S. Ct. 281, 282-84 (1982) (*per curiam*); *INS v. Hibi*, 414 U.S. 5, 8-9 (1973) (*per curiam*). Neither the "exculpatory evidence," which apparently consisted of information that the Selbstschutz, or Omakaitse, was no longer considered inimical to the United States, nor the unfairness of the respondent's Soviet conviction was relevant to the issues in the denaturalization proceeding. Therefore, the Government attorneys did not engage in affirmative misconduct in failing to call these matters to the district court's attention.

The respondent has also argued that he is a "refugee" within the meaning of the United Nations Convention Relating to the Status of Refugees, 189 U.N.T.S. 150 (July 28, 1951) (the Convention), and as such must be given reasonable time to find a country, other than Estonia in the U.S.S.R., which will accept him. In 1968, the United States acceded to the United Nations Protocol Relating to the Status of Refugees, Jan. 31, 1967 [1968] 19 U.S.T. 6223, T.I.A.S. No. 6577. That Protocol binds the parties to it to comply with the substantive provisions of the Convention. *INS v. Stevic*, ____ U.S. ____, 52 U.S.L.W. 4724, 4727 (U.S. June 5, 1984). Article 32.3 of the Convention provides that a refugee who is expelled from a host country must be given a reasonable period of time to seek legal admission to another country. 19 U.S.T. at 6275-76. However, the Convention specifically excludes from the definition of "refugee" any person who has committed a crime against peace, a war crime, or a crime against humanity. Article 1.F(A) of the Convention, 19 U.S.S.T. at 6261-63. We consider the respondent's assistance in Nazi persecution of Jews and Communists at the Tartu concentration camp to constitute a crime against humanity which excludes him from the

Convention's definition of a "refugee." Thus, he is not eligible to claim the benefits of the Convention. In any event, the issue raised by the respondent would appear to be moot: the immigration judge found the respondent deportable in May, 1983, thus he has already had over 1 year to seek admission to a country other than the U.S.S.R.

The respondent also contends the immigration judge's designation of the U.S.S.R. as the country of deportation amounts to cruel and unusual punishment because he is under sentence of death in that country. Deportation is not punishment; it is a refusal to harbor a person whom the Government does not want. *Harisiades v. Shaughnessy, supra*, at 394. Thus, the respondent's deportation to the U.S.S.R. does not come within the eighth amendment's prohibition of cruel and unusual punishment. *Fong Yue Ting v. United States*, 149 U.S. 698, 730 (1893); *Crain v. Boyd*, 237 F.2d 927 (9th Cir. 1956).

Lastly, the respondent has argued that the immigration judge's designation of the U.S.S.R. is unreasonable in light of the fact that the United States has refused to recognize the legitimacy of the Soviet annexation of Estonia. We are unable to assess the merits of this argument because the immigration judge's decision is silent as to the basis for his designation of the U.S.S.R. Moreover, on appeal the Service failed to state its position on the effect of the Soviet annexation of Estonia upon designation of a country of deportation.[11] Thus, a remand on this issue is appropriate.

ORDER: The appeal is dismissed as to all of the issues except that of the reasonableness of the immigration judge's designation of the U.S.S.R. as the country of deportation. Inasmuch as we are unable to ascertain the reasons for that designation, the

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[11] In *Matter of S-Y-L-*, 9 I&N Dec. 575 (BIA 1962), we refused to deport a national of Communist Mainland China to that country because the United States did not recognize the legitimacy of the Communist government there. Our policy against deporting aliens to Communist China was not discontinued until we recognized the legitimacy of that government. *Matter of Cheung*, 10 I&N Dec. 690 (BIA 1979).

case is remanded to the immigration judge so that he may consider the implications of the United States' refusal to recognize the Soviet annexation of Estonia, designate a country of deportation pursuant to the appropriate provisions of section 243(a) of the Act, 8 U.S.C. 1253(a), and articulate the statutory basis for selecting whichever country is designated. Upon remand both the respondent and the Service may be given an opportunity to submit additional evidence or arguments on these issues.

Chairman

Opinion of the Immigration Judge, dated May 19, 1983

UNITED STATES DEPARTMENT OF JUSTICE
Executive Office for Immigration Review

File: A8 085 626 - New York, NY Dated: May 19, 1983

In the Matter of

KARL LINNAS,

Respondent.

IN DEPORTATION PROCEEDINGS

IN BEHALF OF RESPONDENT:	IN BEHALF OF SERVICE:
Ivars Berzins, P.C. 484 West Montauk Highway Babylon, New York 11702	Neal M. Sher, Esq. Office of Special Investigations P.O. Box 28603 Washington, D.C. 20005

CHARGES:	I&N Act -	Section 241(a)(1) - (8 USC §1251(a)(1) - Excludable at time of entry under section 2, 10 and 13 of DPA,
	I&N Act -	Section 241(a)(2) - (8 USC §1251(a)(2) - Entered in violation of section 2, 10 and 13 of DPA;
	I&N Act -	Section 241(a)(19) - (8 USC §1251(a)(19) - Participation in persecution.
APPLICATIONS:	I&N Act -	Section 208 - (8 USC §1158) - Political asylum; Section 243(h) - (8 USC §1253(h) - Withholding of deportation; Section 245 - (8 USC §1255) - Adjustment of status; Section 244(a)(1) - (8 USC §1254(a)(1) - Suspension of deportation.

Opinion of the Immigration Judge, dated May 19, 1983

DECISION OF THE IMMIGRATION JUDGE

The respondent is a sixty-three year old male alien, a native of Estonia, who entered the United States on August 17, 1951, under the Displace Persons Act of 1948. He was naturalized as a United States citizen on February 5, 1964. On July 30, 1981, he was denaturalized by order of Judge Jacob Mishler of the USDC for the FDNY (Exh. 4) on the grounds that his citizenship was illegally procured and procured by willful misrepresentation of material facts.

The Court of Appeals for the second circuit affirmed the denaturalization order (685 F.2d 427-1-25-1982). On October 4, 1982, the Supreme Court denied certiorari (103.5 Ct 179) (Exh. 5A).

The respondent waived his personal appearance (Exh. 1) and his counsel denied all the allegations and charges on the Order to Show Cause. He designated the Republic of Estonia. The USSR was designated as an alternate under section 243(a)(4) - (8 USC 1253(a)(4) of the Act. The Service offered the decision, a transcript of the proceedings and parts of the record in the denaturalization case (Exhs. 4, 7-12). Based on this evidence, I find that deportability has been established by clear, convincing and unequivocal evidence. *Woodby v. INS*, 385 US 276 (1966). In any event under the doctrine of collateral estoppel, the respondent is estopped from relitigating the issues which led to his denaturalization and which are set forth in the Order to Show Cause. *Matter of Rina*, 15 I&N Dec. 346 (1975). *See Parklane Hosiery Co. Inc. et al Petrs v. Shore*, 439 US 322 (1979).

The respondent argues that he was denied a fair opportunity to litigate the issues in the denaturalization proceeding. He questions the judgment of the District Court, the Court of Appeals and the Supreme Court. He also is attempting to impugn the findings of the District Court and is highly critical of it. This attack on the District Court's judgment begs the question. It would be presumptuous of me and also improper to go behind the findings in the denaturalization proceedings.

Opinion of the Immigration Judge, dated May 19, 1983

The respondent also argues that the issues in the denaturalization proceedings were not "actually and necessarily determined" by the District Court. Yet the respondent conceded that the District Court found him ineligible for admission to the United States under sections 2 and 10 of the Displaced Persons Act. (see allegations 3-7 on the Order to Show Cause) The latter allegations having been litigated, cannot be relitigated. *Matter of Rina, supra.* Therefore, the charges of deportability on the Order to Show Cause (1-2, 4-5) are sustained.

The respondent questions the determination of inadmissibility under section 13 of the DPA, alleging that the Court made its finding in a footnote. The respondent also questions the validity of section 241(a)(19) of the Act (Holtzman amendment) and denies that the background facts were litigated. Again the respondent is in error. Judge Mishler found that the respondent was a member of the "Selbstschutz" or Home Guard which aided "the Germens in the administration of their sinister plan" (p. 18 Exh. 4). He found that the respondent also served "in a supervisory role in the management of the Tartu Concentration Camp" (p. 19 Exh. 4). In *Fedorenko v. INS*, 449 US 490 (1981), the Supreme Court held that an individual's voluntary or involuntary service as a concentration camp guard made him ineligible for a visa. The District Court found that the respondent was also a voluntary member of the German Army during World War II, specifically the 38th Estonian Police Battalion.

Section 2 of the Displaced Persons Act of 1948 (Exh. 7) incorporated the definition of "refugees or displaced persons" contained in Annex I to the Constitution of the International Refugee Organization of the United Nations (IRO) (Exh. 7).

The latter provided that the following persons would not be eligible for refugee or displaced person status:

> "2. Any other person who can be shown: (a) to have assisted the enemy in persecuting civil populations of countries, Members of the United Nations or (b) to have voluntarily assisted the enemy forces since the outbreak of the second world war in their operations against the United Nations."

Opinion of the Immigration Judge, dated May 19, 1983

The evidence of record before me is clear, convincing and unequivocal that the respondent was ineligible for a visa under section 2 of the Displaced Persons Act. The record establishes that if the respondent had disclosed his activities as a concentration camp functionary or voluntarily served in an Estonian unit connected with the German armed forces he would not have been found eligible for a visa (Exh. 7 - section 2 of DPA). Section 10 of the Displaced Persons Act provided that:

> "Any person who shall willfully make a misrepresentation for the purpose of gaining admission into the United States as an eligible displaced person shall thereafter, not be admissible into the United States.' (Exh. 7)

The respondent failed to disclose any of his aforementioned war time activities, claiming to be a student during most of that period (see Exh. 4). The respondent's misrepresentations were clearly material - no visa would have been issued if the true facts were known. *Matter of S- and B-C*, 9 I&N Dec. 436 (Att'y Gen. 1961).

Section 13 of the DPA provided that "no visa shall be issued under the provisions of the Act . . . to any person who advocated or assisted in the persectuion of any person because of race, religion or national origin."

The District Court found that the respondent also failed to satisfy this section of the DPA (footnote 32 of Exh. 4). I will not impugn this finding because it is cited in a footnote. In any event an alien may be found deportable on only one charge, assuming the others were not established. See *Marillo-Aguilera v. Rosenberg*, 9351 F.2d 289 (9th Cir. 1965).

Respondent's ineligibility under section 2, 10 and 13 of the Displaced Persons Act rendered him excludable from entry into the United States (no valid visa). Therefore, his is deportable under sections 241(a)(1) and (a)(2) of the Act.

The last charge of deportability under section 241(a)(19) of the Act, that the respondent ordered, incited, assisted or otherwise

participated in the persecution of persons because of race, religion, national origin or political opinion between March 23, 1933 and May 8, 1945 under the direction of or in association with the Nazi government of Germany has also been established. This section repeats the crucial language of section 13 of the DPA supra, which Judge Mishler ruled upon adversely to the respondent.

I find that all charges of deportability have been proven by the Service, the issues having been litigated in a prior proceeding. The respondent is collaterally estopped from relitigating them in this proceeding *Matter of Rina, supra.*

I also independently find based on the entire record of proceeding that deportability has been established by clear, convincing and unequivocal evidence. The respondent submitted numerous applications for discretionary relief: 1) waiver of deportation under section 241(f) of the Act; 2) asylum (section 208 of the Act) and/or withholding of deportation under section 243(h) of the Act; 3) suspension of deportation under section 244(a)(4) of the Act; 4) voluntary departure under section 244(e) of the Act; 5) adjustment of status under section 245 of the Act.

Without discussing the merits of each of the applications, the respondent is statutorily ineligible for any and all requests for relief from deportation on the basis of the Holtzman amendment (section 212(a)(33) of the Act and section 241(a)(19) of the Act or comparable language:

1) section 241(f) waiver requires that respondent be "otherwise admissible" - respondent would have been excludable under section 212(a)(33) of the Act.

2) asylum (section 208) of the Act - respondent is ineligible under 8 CFR 208.4(a)(iii)-comparable language to section 212(a)(33) of the Act; section 243(h) of the Act - respondent is ineligible because of comparable language in section 243(h)(2)(A) of the Act.

Opinion of the Immigration Judge, dated May 19, 1983

3) suspension of deportation - section 244(a)(1) of the Act proscribes conduct set forth in section 241(a)(19) of the Act.

4) voluntary departure - section 244(e) of the Act proscribes conduct set forth in section 241(a)(19) of the Act.

5) adjustment of status under section 245 of the Act requires that the alien be eligible for a visa (the visa petition submitted has not been approved) and is admissible to the United States for permanent residence. Whether the visa petition is approved or not the respondent is inadmissible under section 212(a)(33) of the Act.

ORDER: IT IS ORDERED that the respondent be deported from the United States to Estonia on the charges contained in the Order to Show Cause.

IT IS FURTHER ORDERED that if the aforenamed country advises the Attorney General that it is unwilling to accept respondent into its territory or fails to advise the Attorney General within three months following original inquiry whether it will or will not accept respondent into its territory, respondent shall be deported to the USSR.

HOWARD I. COHEN
Immigration Judge

Opinion of the Court of Appeals (denaturalization), dated January 25, 1982

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

At a stated Term of the United States Court of Appeals for the Second Circuit, held at the United States Courthouse in the City of New York, on the 25th day of January, one thousand nine hundred and eighty-two.

Present:

HONORABLE WILFRED FEINBERG
Chief Judge
HONORABLE WALTER R. MANSFIELD
HONORABLE AMALYA L. KEARSE
Circuit Judges

81-6165

UNITED STATES OF AMERICA,

Appellee,

- v. -

KARL LINNAS,

Appellant.

Appeal from the United States District Court for the Eastern District of New York.

This cause came on to be heard on the transcript of record from the United States District Court for the Eastern District of New York, and was argued by counsel.

Opinion of the Court of Appeals (denaturalization), dated January 25, 1982

ON CONSIDERATION WHEREOF, it is now hereby ordered, adjudged and decreed that the judgment of said District Court be and it hereby is AFFIRMED.

Karl Linnas appeals from a judgment of the United States District Court for the Eastern District of New York entered on July 30, 1981 after a trial before Jacob Mishler, J. The judge ordered revocation of appellant's certificate of naturalization under section 340(a) of the Immigration and Nationality Act (INA), 8 U.S.C. § 1451(a), because it was "illegally procured" and because it was "procured by concealment of a material fact or by willful misrepresentation." The judgment of the district court has been stayed pending this appeal.

The government sought to denaturalize appellant on a number of grounds. In Count I of its complaint, the government alleged that appellant was never lawfully admitted into the United States as required by section 316(a)(1) of the INA, 8 U.S.C. § 1427, because his activities as a Nazi concentration camp guard during World War II precluded him from entering the country under the Displaced Persons Act of 1948 (DPA), Pub. L. No. 80-774, ch. 647, 62 Stat. 1009 (1948), and because his willful misrepresentations under the DPA made him ineligible for admission. Under Counts II and III, the government sought appellant's denaturalization on the ground that during naturalization proceedings of 1960, he procured his citizenship by concealment or misrepresentation of facts material to his eligibility for citizenship. In particular, the government alleged that contrary to appellant's sworn statements, he had committed crimes of moral turpitude and was not a person of good moral character. Count IV alleged that appellant's citizenship was illegally procured because he in fact was not of good moral character. Count V alleged that as a matter of statutory law, appellant

was not a person of good moral character because he had given false testimony to obtain benefits under the INA in violation of section 101(f)(6) of the INA, 8 U.S.C. § 1101(f)(6).

In a thorough and carefully reasoned opinion, dated July 30, 1981, Judge Mishler endorsed all of the grounds for denaturalization proffered by the government. We affirm essentially for the reasons set forth in the district court's opinion, although a few matters require elaboration. First, appellant argues that he was deprived of due process and a fair trial because he was denied his privilege against self-incrimination. As indicated in several memoranda preceding his July 30 opinion, Judge Mishler consistently rejected appellant's fifth amendment claim in the context of denaturalization proceedings. In his July 30 decision, however, Judge Mishler expressly disavowed reliance on any adverse inferences drawn from appellant's refusal to testify. Under the circumstances, this exclusive reliance on independent evidence mooted any fifth amendment claim appellant might have.

Appellant also contends that numerous documents were improperly admitted into evidence because they did not comply with various federal rules, including Fed. R. Civ. P. 44(a)(2) and Fed. R. Evid. 902(3), (4). Because appellant failed to raise in the trial court the specific objections made here, he has waived these claims. 5 J. Weinstein & M. Berger, Weinstein's Evidence Para. 902(3)[01](1978). Moreover, these materials complied with the requirements of the federal rules, especially since the rules were "designed to meet the practical problems in obtaining properly authenticated documents from abroad by abolishing all unnecessary procedural requirements," id.

Finally, appellant challenges the admissibility of various foreign depositions. These contentions must

also be rejected. Judge Mishler did not abuse his discretion in rejecting appellant's motions to depose Soviet officials and to have depositions taken outside the Soviet Union. Nor did appellant demonstrate that he was so indigent that the government should bear his attorney's costs in attending the depositions. Hence, Judge Mishler did not abuse the wide discretion ordinarily accorded a trial judge in refusing to subsidize such expenses. Finally, any alleged procedural deficiencies in taking the depositions and any inconsistencies in the deponents' testimony went to the weight rather than the admissibility of the evidence. Judge Mishler adequately took these factors into account in reaching his decision.

We have considered all of apellant's arguments and they are without merit. We affirm the judgment of the district court.

/s/ _____
WILFRED FEINBERG,
Chief Judge

/s/ _____
WALTER R. MANSFIELD,

/s/ _____
AMALYA L. KEARSE,
Circuit Judges.

Opinion of the District Court (denaturalization), dated July 30, 1981

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

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79 C 2966

UNITED STATES OF AMERICA,

Plaintiff,

-against-

KARL LINNAS,

Defendant.

Memorandum of Decision and Order
July 30, 1981

APPEARANCES:

HONORABLE EDWARD R. KORMAN
UNITED STATES ATTORNEY
EASTERN DISTRICT OF NEW YORK
225 Cadman Plaza East
Brooklyn, New York 11201
Leonard Sclafani,
Assistant United States Attorney,
Of Counsel

Opinion of the District Court (denaturalization), dated July 30, 1981

OFFICE OF SPECIAL INVESTIGATIONS
CRIMINAL DIVISION
DEPARTMENT OF JUSTICE
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Rodney G. Smith, Trial Attorney
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MISHLER, District Judge

The United States of America commenced the instant action on November 21, 1979 pursuant to the Immigration and Nationality Act of 1952, as amended, 8 U.S.C. §1451(a), to revoke the Certificate of Naturalization (No. 7641679) of defendant, Karl Linnas, and to vacate the order of the New York Supreme Court (Suffolk County) admitting defendant to United States citizenship. The Government seeks to upset defendant's naturalization obtained in February of 1960 on the theories that his citizenship was (1) "illegally procured" and (2) "procured by concealment of the material fact or by willful misrepresentation." Either of these theories, if proven by " 'clear, unequivocal, and convincing' " evidence which does not leave " 'the issue in doubt,' " *Schneiderman v. United States*, 320 U.S. 118, 125 (1943) (quoting *Maxwell Land Grant Case*, 121 U.S. 325, 381 (1887)),[1] would provide the court with no alternative but to enter judgment of denaturalization against defendant. *Fedorenko v. United States*, ___ U.S. ___, 101 S.Ct. 737, 352-53 (1981).

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[1] The Supreme Court has recently reaffirmed the applicability of the heavy burden of proof which is placed on the Government when it attempts to revoke an individual's citizenship. *Fedorenko v. United States*, ____ U.S. ____, 101 S.Ct. 737, 747 (1981).

The Government's case turns on the legality of defendant's entry into this country in 1951 under the Displaced Persons Act of 1948, Pub.L.No. 80-774, ch. 647, 62 stat. 1009, as amended (the "DPA"). The Government's five-count complaint alleges, *inter alia*, various heinous acts on the part of defendant during his residence in Tartu, Estonia between August 1941 and May 1943. In Count 1, the Government alleges that defendant was never lawfully admitted into the United States, a condition precedent for naturalization under Section 316 (a)(1) of the Immagration and Nationality Act, 8 U.S.C. §1427, because (1) his activities during World War II precluded him from obtaining lawful entrance into the United States as an eligible person under the DPA, and (2) his willful misrepresentations made for "the purpose of gaining admission into the United States" under the DPA made him ineligible for admission under the Act. Counts II and III seek defendant's denaturalization based on the contention that his citizenship was procured by the concealment or misrepresentation of facts material to his eligibility for citizenship during the process leading to his naturalization in 1960. Contrary to defendant's sworn statements made for the purpose of acquiring citizenship, it is claimed that (1) he had committed crimes of moral turpitude, and (2) he was not a person of good moral character. Count IV alleges that defendant's citizenship was illegally procured since he in fact was not a person of good moral character. Finally, Count V states that, as a statutory matter, defendant was not a person of good moral character since he had given "false testimony for the purpose of obtaining . . . benefits" under the Immigration and Nationality Act. Section 101(f)(6) of the Immigration and Nationality Act, 8 U.S.C. §1101(f)(6).

I. Pre-Trial Proceedings

On September 24, 1980, the court granted the Government's motion pursuant to Rule 37(a), Fed.R.Civ. P., to compel defendant to answer certain enumerated

interrogatories. Defendant expressly defied the court's order by failing to fully answer the Government's interrogatories. The Government's subsequent motion for sanctions, wherein it requested that all relevant facts pertaining to the Government's unanswered interrogatories be deemed established, was granted. However, because of the peculiar nature of denaturalization proceedings, and in view of the "severe and unsettling consequences" which might ensue from the loss of citizenship, *Fedorenko v. United States,* 101 S.Ct. at 747, the court left defendant with the opportunity to rebut the facts which we would otherwise "deem [ ] established beyond a reasonable doubt . . ." (Memorandum of Decision and Order dated October 14, 1980 — finding of fact found at Appendix A). Following our imposition of sanctions pursuant to Rule 37(b)(2)(A) for the Failure to answer interrogratories, defendant failed to answer certain questions at his deposition continuing his earlier claim rejected by the court of a Fifth Amendment privilege against self-incrimination. The court again ordered defendant to provide the Government with discovery, this time through his deposition testimony, and defendant once again refused. Consequently, the Government's proposed findings of fact sought to be proved through defendant's deposition testimony which he failed to provide was deemed to be established beyond a reasonable doubt, subject to rebuttal by defendant at trial. (See Memorandum of Decision and Order dated January 12, 1982 — findings of fact found at Appendix B).

Though the Government had established the facts necessary to prove its *prima facie* case prior to trial, thereby relieving the Government of the need to offer evidence concerning many crucial facts pending the defense's offer of contradictory evidence at trial, the Government's pre-trial memorandum provided defendant with notice that it would present evidence on its

Direct case that would support its claims independent of the court's pre-trial fact findings made pursuant to Rule 37(b)(2)(A), Fed.R.Civ.P. (Government's Pre-Trial Memorandum mailed to defendant June 12, 1981).[2] Because the Government's offer of proof at trial overwhelmingly supported the allegations stated in its complaint, our decision today is based upon findings of fact established solely through the evidence adduced at trial.[3]

The case was tried before the court without a jury.

II The Trial

The defendant, Karl Linnas, was born on August 6, 1919 in Tartu, Estonia. He married his wife Linda on July 7, 1944 in Haapsalu, Estonia and entered the United States on August 17, 1951 for the purpose of establishing permanent residence. (Government Exhibit 31, K Linnas Petition for Naturalization).[4]

During the years 1940 through 1943, defendant resided in Tartu, Estonia. (GX-31, K. Linnas' Applica-

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[2] As we stated at the December 15, 1980 pre-trial conference, a trial on the merits would ensue in spite of the findings of fact made pursuant to Rule 37, Fed.R.Civ.P. The *only* advantage to the Government arising from the sanctions imposed on defendant for his failure to comply with discovery was that the Government had sustained its *prima facie* case. (Transcript filed with the court on January 26, 1981 at 10.)

[3] Defendant's counsel made numerous objections during the course of the trial that he was not given an adequate opportunity to prepare a defense. The objections were frivolous. The Government had expeditiously supplied the defense with extensive discovery. Moreover, on at least one occasion during the trial, the court offered the defense an opportunity to offer proof concerning an issue raised at trial at any time before the rendering of this decision. (Record 319-320). We note that the defense has failed to submit any further evidence since the completion of the in-court proceedings on June 19, 1981 which might suggest a different view of the facts than that which we have deduced from the evidence presented at the trial.

[4] Hereinafter, Government exhibits admitted into evidence shall be designed by the letters "GX".

tion for Immigration Visa and Alien Registration). In part, the trial focused on the activities of the German military forces, and the assistance provided them by an organization of Estonian nationals known as the "Home Guard" or "Self-Help" forces (referred to as the "Selbstschutz" by the Germans and as the "Omakaitse" by the Estonians) during the German occupation of Tartu which began in the summer of 1941. Specifically, the Government's case established clearly, unequivocally, and convincingly defendant's involvement as an active and voluntary member of the Selbstschutz starting in July of 1941. However, the information defendant had provided to immigration officials represented that he was a university student in Tartu during the period 1940-1943. Defendant failed to testify at trial on his own behalf,[5] and moreover, failed to appear at the trial.

A. Historical Background

The Government called Dr. Raul Hilberg to comment on the German military movement into the Soviet Union following the German invasion on June 22, 1941 and to describe various German policies and the imple-

[5] It is well within the discretion of a trial judge to draw an adverse inference against a defendant in a denaturalization proceeding because of his unexplained failure to testify on matters peculiarly within his knowledge. *Cabral-Avila v. Immigration and Naturalization Service*, 589 F.2d 957, 959 (9th Cir. 1968), *cert. denied*, 440 U.S. 920 (1978); *United States v. Costello*, 275 F.2d 355, 359 (2d Cir. 1960), *aff'd*, 365 U.S. 265, (1961). The Government, however, has sustained its burden without our drawing this permissible inference.

mentation of those policies during their initial assault.[6] Professor Hilberg testified that the German invasion into Estonia occurred in mid-July 1941. The invading German forces that swept through Tartu included the mobile killing units know as the "Einsatzkommandos." These units formed battalions, referred to as "Einsatzgruppen," which were charged with carrying out Nazi policy aimed at the annihilation of Jews and other groups found inimical to the Reich. (Record at 50-51, GX-2 through 10). Professor Hilberg described the operation of the Einsatzgruppen in one of his publications as follows:

> "When the German Wehrmacht — the armed forces — attacked the USSR on June 22, 1941, the invading armies were accompanied by small mechanized killing units of the SS and Police which were tactically subordinated to the field commanders but otherwise free to go about their special business. The mobile killing units were operating in the front-line areas under a special arrangement and in a unique partnership with the German Army.
>
> * * *
>
> The geographic distribution of Soviet Jewry determined to a large extent the basic strategy of the

[6] The court found Dr. Hilberg eminently qualified to testify on these matters. Dr. Hilberg has researched the holocaust since 1948 and has had the opportunity to examine numerous collections of captured German documents for the purpose of reconstructing the situation in Eastern Europe during World War II. (Record at 27-28). He testified that there was only one collection in the United States which he had not visited. (*id.* at 30). The witness has written extensively on the holocaust which he defined as the "physical destruction of European Jewry under the Nazi regime between 1933 and 1945." (*id.* at 23). His first publication, *The Destruction of the European Jews*, was published in 1961 and documented the Germans' diabolical destruction plans during the period 1933 to 1945. The work is some 800 pages in length and is substantially based on information contained in captured Nazi German documents. (*id.* at 36-41).

> killing units. To reach as many cities as fast as possible, the Einsatzgruppen moved closely upon the heels of the advancing armies, trapping the large Jewish population centers before the victims had a chance to discover their fate. . . In accordance with the agreement, units of Einsatzgruppen A entered the cities of Kaunas, Lepaya, Yelgava, Riga, Tartu, Tallin and the Larger suburbs of Leningrad with advance units of the army."
> (GX-1 at pp. 177 and 191).

The Einsatzkommandos executed their duties in Tartu, Estonia, with the assistance of the Estonian "Home Guard," the Selbstschutz[7] (Record at 52-57; GX-2 through 10). Dr. Hilberg's testimony was uncontroverted and is supported by captured German war records contained in the library of the United States National Archives. (GX-2 through 10).

Einsatzgruppen A, aided by the Selbstschutz, was successful in achieving one of its major objectives. By mid-January 1942, the Chief of the Security Police and the Security Service was able to report that Estonia was "Judenfrei" (free of Jews) and that the execution of the Jews had been handled in such a manner so as to minimize public attention to the fact of the German extermination process. (Record at 58, GX-6). While Jews were shot soley based upon the determination of their religious ancestry, Communists were shot only if they were active in the party, with the balance either being

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[7] In his testimony, Dr. Hilberg stated that "[t]he German personnel in the Einsatzgruppen did not [personally] engage in arrests or shootings to any great extend. They acted more as supervisors of indigenous personnel that were engaged in these activities." (Record at 55). The activities were carried out by the Germans' willing attendants–the Selbstschutz. (Record at 56).

set free or detained in concentration camps.[8] (Record at 56).

The Government offered the preceding historical evidence to establish, among other things, that if defendant was in fact a member of the Selbstschutz, then the Government's case would have shown that defendant assisted the enemy in persecuting civil populations. The evidence adduced at trial proved beyond a reasonable doubt that defendant was a ranking member of that organization; it also supported the conclusion that he committed deeds which, independent of his membership in the Selbstschutz, would require his denaturalization.[9]

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[8] As of September 19, 1941, the Chief of the Security Police and Security Service reported on the approximately 1200 arrests that had occurred in Tartu since the inception of German occupation earlier that summer:

> "The greater part of them involve persons who were arrested for Communist activity. 504 persons were set at liberty after inquiries were completed and they were registered in lists. 150 persons were released since there were obviously no grounds for arrest. 291 prisoners were transferred to the detention camp established and supervised by the Tartu Military Administration Headquarters. A total of 405 persons were executed in Tartu, including 50 Jews. There are no longer any Jews in custody." (GX-3).

[9] During some time in June 1940, the country of Estonia was annexed by the Soviet Union. Defendant's post-trial memorandum suggests that the forcible occupation and annexation of Estonia by the Soviet Union, given the atrocities which the Soviets committed during that conquest, provide ample justification for Estonians who chose to bear arms against the invaders of their homeland. We do not question justifiability of the Estonian desire to purge its land of the Soviet element. Nevertheless, defendant's motivations have no legal significance given the facts established by the Government at trial, e.g., defendant's supervision and participation in *atrocities* committed against human life. We also note that even if motivation could provide a basis for "legal justification," defendant offered no evidence on what *his* motivations were for joining the Selbstschutz and aiding the German cause.

B. Linnas Involvement in the Selbstschutz

1. Eyewitness Testimony

The Government conducted video-taped oral depositions in the Soviet Union of four individuals. Three of the four deponents were shown an eight-picture photospread from which each positively identified defendant as an individual who held a position of responsibility in the detention of Jews and others being held either at the exhibition grounds located near Tartu or, after the concentration camp relocated, at the Kuperjanov Barracks on Kastani Street, The four individuals who testified by video-taped deposition were: Hans Laats, Olav Karikosk, Oskar Art, and Elmar Puusepp.

Hans Laats supervised the guards who guarded the prisoners at the Kuperjanov Barracks in Tartu. (GX-19-A at 17). He testified that Linnas served as a guard at the exhibition grounds and several months thereafter became the chief of the relocated concentration camp at the Kuperjanov Barracks. (*id.* at 22-23). Defendant, Laats, and the other guards at the camp were members of the Selbstschutz. (*id.* at 12, 15, 23).

Laats witnessed the execution of prisoners who had been held at the Kuperjanov Barracks. Those who were to be executed were kept in a special barracks at the camp on Kastani Street. (*id.* at 18). On a number of occassions he observed defendant supervising the prisoners who were being escorted out of the special barracks to an execution site. (*id.* at 23). Laats confessed to his own presence at one execution conducted at an anti-tank ditch (known as the "Jalaka Line") outside Tartu. This excavation had been converted by the Einsatzkommandos into a mass grave site for the victims of their extermination process. In recounting a portion of Jalaka Line execution, he stated that Linnas was the individual who had announced the death sentence and had commanded the guards to fire

on the prisoners who were kneeling at the ditch's edge.[10] (*id.* at 24).

Laats identified Linnas both at his video-taped deposition and at an earlier meeting with a representative of the Department of Justice as chief of the concentration camp at the Kuperjanov Barracks. (*id.* at 33-36). We find that the eight-picture photospread from which Linnas was identified, considering the totality of the circumstances, indicates that Laats identification of Linnas was reliable.[11] *Cf. Neil v. Bigger,* 409 U.S. 188, 199-200 (1972) (reliability of pre-trial identifications in the context of criminal prosecutions).

Olav Karikosk, a former concentration camp guard personally recruited by Linnas in October 1941, was ordered by Linnas to accompany him to an execution. (GX-20-A at 11-12, 24). The execution ritual was similar to the one described by Laats.[12] Karikosk positively

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[10] Laats further testified that Linnas thereafter approached the ditch and, administering the coup de grace, fired into it. (GX-19-A at 24-25).

[11] We also find that the pre-trial identifications made by Olav Karikosk and Oskar Art were reliable.

In making these determinations concerning reliability, we have been guided by the Court's recommendation in *Neil v. Biggers*:

> "[T]he factors to be considered in evaluating the likelihood of misidentification include the opportunity of the witness to view the criminal at the time of the crime, the witness' degree of attention, the accuracy of the witness' prior description of the criminal, the level of certainty demonstrated by the witness at the confrontation, and the length of time between the crime and the confrontation." 409 U.S. at 199.

[12] He testified that "Jewish women and children . . . were tied by their hands to . . . rope and boarded on [a] bus . . . [after] they had been undressed so that they were there in their underwear," they were then taken outside the city to a so-called Jalaka Line some ten kilometers away from the city." (GX-20-A at 22-23). Upon arrival, the prisoners were commanded to kneel in front of the anti-tank ditch, their death sentences were given, and they were shot. (*id.* at 25-26).

identified Linnas at his video-taped deposition and on an earlier occasion as the chief of the concentration camp at the Kuperjanov Barracks.[13]

Oskar Art testified that he drove a bus which transported prisoners — on one occasion Jews, on two occasions non-Jews — to the Jalaka Line where they were shot. (GX-18-A at 18-24). Again, the execution ritual was similar to that described by Laats. Art stated that the prisoners were guarded by the Selbstschutz at all times. (*id.*). During one of the three executions in which he was involved, Linnas was present when the prisoners were herded onto the bus destined for the execution site and when they were shot. (*id.* at 29). Art had known Linnas before the German occupation, (*id.* at 26-27). Art saw Linnas frequently after becoming a prisoner at the camp. (*id.* 30-31). Laats believed that Linnas was chief of the guards at the camp and the highest ranking Estonian there. (*id.* at 32-34). After viewing a photospread virtually identical to those used in the previously mentioned video-taped depositions, Art identified Linnas as chief of guards at the concentration camp at the Kuperjanov Barracks.[14] (*id.* at 34-40).

Elmer Puusepp was arrested by members of the Selbstschutz during the summer of 1941 because he had been a political officer under the Soviet Government. (GX-21—A at 7-8). Puusepp was eventually brought to the Kuperjanov Barracks with a group of approximately forty prisoners. (*id.* at 18-20). The group was divided in

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[13] Karikosk selected Linnas from an eight-picture photospread identical to the one presented to Laats except for the juxtaposition of the photographs.

[14] The photograph of Linnas which appeared in each of the photospreads presented to the witnesses at each of the video-taped depositions conducted in the Soviet Union was the photograph of defendant submitted with his visa application in 1951.

half. (*id.* at 20). The group to which he was not assigned was sent to the "death barracks," and Puusepp never saw anyone in that group again. (*id.* at 20, 25).

Puusepp testified that the man who he came to know as Linnas on one occasion had received prisoners at the Tartu concentration camp. (*id.* at 20-21). He recounted a second instance in which he had seen Linnas participate in the operations at the Kuperjanov Barracks. This incident occurred in the City of Tartu when Linnas helped direct Jews being ordered from a Jewish school onto a red bus which had been used on other occasions to remove prisoners from the death barracks at the concentration camp. (*id.* at 29). Linnas was seen helping a little girl "5 or 6 years old" with a doll as large as she was onto the bus. (*id.*). Puusepp noticed a guard carrying the little girl's doll to storage that very same evening together with clothing and other personal effects taken from those persons who had just been executed. (*id.* at 31).

His account of the general conditions at the camp was as follows: prisoners were fed soups made out of "[h]alf-rotten horse corpes or horse carcasses," (*id.* at 22); lice prevented the prisoners from sleeping, (*id.* at 38); and the barracks were so "tightly packed" that, at times, it was impossible to turn over. (*id.*)

Dr. Keiland, a citizen of Finland at the time of trial and a resident of Tartu during the subject period, testified at trial and stated that he witnessed the detention of Jews and non-Jews — men, women, and children — at the exhibition grounds ("Naituse Valjak") in Tartu during July 1941. (Record at 177-179). During his several visits to the exhibition grounds he viewed "Jews lying, sitting and sleeping in [cages of barbed wire.] (*id.* at 178-181). Dr. Keiland did not see defendant at the camp on any of

his trips. (*id.* at 183). However, he did identify those guarding the detainees as members of the Selbstschutz. (*id.* at 179-180).

Each of the video-taped depositions was admitted into evidence. The defense refused to attend the depositions held in the Soviet Union because it contented that any such proceeding conducted there would be a sham. Evidence offered at trial through defense witnesses attempted to show that the Soviets, on many occasions, have manipulated and, at times, have manufactured evidence to convict innocent Soviet citizens for the purpose of attaining political objectives of the Soviet Communist party. In essence, defendant contents that we must adopt a *per se* rule excluding all evidence deriving from Soviet sources. In rejecting this contention, we simply note one of the fatal flaws in defendant's broadbush attack on Soviet-source evidence. In the context of this case, the defense witnesses were unable to cite *any* instance in a western court in which falsified, forged, or otherwise fraudulent evidence had been supplied by the Soviet Union to a court or other governmental authority. (Record at 470, 597-598, 646).[15]

The defense was unable to come forward with *any* proof that any of the Government's evidence offered at trial, either testimonial or documentary, was incredible or unauthentic in any respect. We find that defendant's defense by innuendo is without any merit. Having foresaken its right of cross-examination at the depositions

[15] After reading the deposition transcripts and viewing portions of each of the video-tapes taken in the Soviet Union, we find that the Government witnesses were credible.

taken in the Soviet Union, the defense cannot now claim foul play.[16] Moreover, various documents signed by Linnas (discussed hereunder) and the admission made by him to Richard Siebach (see note 17) corroborate the testimony of the Soviet witnesses as to Linnas' position and authority at the Tartu Concentration Camp.

2. Documents Signed by Linnas as Chief of the Concentration Camp

The Government offered copies of four documents bearing the signature "Karl Linnas" over the title "Chief of Concentration Camps" or "Chief of Tartu Concentration Camp" (GX-26, 27, 28, 30). These documents, dated November and December 1941, were certified by the Consular Division of the U.S.S.R. Embassy in accordance with Rules 902(3) and 902(4) of the Federal Rules of Evidence and Rule 44, Fed.R.Civ.P.

Each of the documents was admitted into evidence. The documents concerned the routine operation of the camp consisting of orders and correspondence pertaining to prisoners (GX-27, 28, 30) and a pass authorizing a guard to bear arms and travel at night (GX-26). These documents, if in fact signed by defendant, would establish Linnas' supervisory role at the Tartu Concentration Camp in the fall of 1941. We

[16] The court however is disturbed by language used by the Soviet prosecutor when introducing members of the Department of Justice to deponents Oskar Art, Olav Karikosk, and Hans Laats. In each instance the Soviet official referred to the instant matter as an action by the United States against the former war criminal, Karl Linnas. The case was variously described as concerning: the "Fascist prisoner murder[er], Karl Linnas," (GX-18-A at 3) and "Karl Linnas, a former war criminal," (GX-19-A at 3, GX-20-A at 3). In evaluating the weight of the testimony given by these deponents, we have been mindful of the prejudicial language employed by the Soviet prosecutor. Accordingly, we have considered this evidence only as supportive and corroborative of the Government's primary evidence of Linnas' involvement at the Tartu Concentration Camp, the documents signed by defendant as chief of the concentration camp.

would further conclude that, as an Estonian, he was a member of the Selbstschutz aiding the Germans in the administration of their master plan.

Special Agent Michael Noblett of the Federal Bureau of Investigation, an expert document examiner, examined the four concentration camp documents and determined that (1) there were "strong indications" that the signatures were authored by defendant, (Record at 274), and (2) the physical condition and composition of the documents supported the conclusion that they are authentic, original and unaltered documents. (*id.* at 661-663). The defense failed to produce a document expert to challenge either their authenticity or the conclusion that defendant was the signatory. We find that the documents were signed by Linnas and are authentic and unaltered. The testimony of Laats, Karikosk, Art and Puusepp corroborates the finding that Linnas was a member of the Selbstschutz and served in a supervisory role in the management of the Tartu Concentration Camp.[17] We find that the Government has met its burden in establishing these facts.

C. Linnas' Service in the German Army Following his Departure from the Tartu Camps

The Government sought to establish that defendant voluntarily entered and served in the Estonian Schutzmannschaft as a junior lieutenant in May 1942, served in its successor organization, and then served in an Estonian Police Battalion between 1942

[17] The Government presented further corroborative evidence of defendant's involvement at the concentration camp in Tartu, Estonia. Richard Siebach testified that defendant denied he had headed the Tartu camp in response to a question by Siebach about a newspaper article on that subject. Rather, defendant claimed only to have been a guard at the Tartu camp. (Record at 306-307).

and 1944. Each of these military forces was an integral part of the German Army in World War II. (Record at 98-102; GX-13 and 14).

We find that defendant voluntarily joined one of the component units of "Security Cadre 41-E" in Tartu, Estonia.[18] (Record at 98; GX-11). This unit, composed largely of members who had served in the Selbstschutz, (Record at 90), was redesignated Schutzmannschaft Battalion 41-E within two months after defendant joined it. (Record at 97; GX-12).

Evidence presented by the Government *compels* the conclusion that some time prior to July 1944 defendant was transferred to the 38th Police Battalion. (Record at 103; GX-15, 16, 17). In July 1944 the 38th Estonian Police Battalion served under the command of an "SS Oberfuhrer" (Senior Colonel) and went into battle in an effort to halt the massive Soviet counter-offensive which was then underway. (Record at 105-106). The documents presented by the Government show beyond any reasonable doubt that Linnas was a volunteer in the 38th Police Battalion. (see Appendix C). The captured German documents, GX-15, 16, 17, contain a great deal of personal information concerning a wounded lieutenant SS volunteer named Karl Linnas. The information contained therein coincides with the information found in defendant's immigration records:

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[18] Dr. Hilberg testified that individuals taken into such units in May of 1942 would have been volunteers. (Record at 94). He had no knowledge of conscription into those units at that time. (*id.*).

	Information From Captured German Documents	Information From Defendant's Immigration Record
Name:	1. Karl Linnas (GX-15, 16, 17)	1. Karl Linnas (GX-31, 39)
Birth Date:	2. August 6, 1919 (GX-16, 17)	2. August 6, 1919 (GX-31, 39)
Place of Birth:	3. Tartu, Estonia (GX-17)	3. Tartu, Estonia (GX-31, 39)
Wounded in Battle:	4. August 30, 1944 (GX-15)	4. August, 1944 (GX-39)
Date of Marriage:	5. July 7, 1944 (GX-15)	5. July 7, 1944 (GX-31)
Wound or Marks of Identification:	6. Large schrapnel penetration to right shoulder joint and upper right arm. (GX-17)	6. Scar on right shoulder and back of neck. (GX-31)

The Government's evidence is uncontroverted and overwhelmingly establishes defendant's service in the 38th Police Battalion, an arm of the German Wehrmacht. Accordingly, we find that defendant served in the German armed forces during World War II.

III. Discussion

A. Postwar Immigration Procedures

In order to understand how defendant failed to comply with the conditions for naturalization, it is necessary to describe briefly the route which an alien

was required to travel.[19] The Government witnesses who offered testimony concerning the standard operating procedures of officers and employees of the International Refugee Organization (the "IRO"),[20] the Displaced Persons Commission, and the American Consulate described the process just as it was outlined by Chief Judge Battisti in *United States v. Demjanjuk*, Dkt. No. C-77-923, Slip Op. at 30-31 (N.D. Ohio June 23, 1981):

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[19] In reviewing the immigration process, we must of course bear in mind that strict compliance with *all* condictions for naturalization is required:

> "This judicial insistence on strict compliance with the statutory conditions precedent to naturalization is simply an acknowledgement of the fact that Congress alone has the constitutional authority to prescribe rules for naturalization, and the courts' task is to assure compliance with the particular prerequisites to the acquisition of United States citizenship by naturalization legislated to safeguard the integrity of this "priceless treasure." *Johnson v. Eisentragger*, 339 U.S. 763, 791, 70 S.Ct. 936, 950, 94 L.Ed. 1155 (1950) (Black, J., dissenting)."

Fedorenko v. United States, 101 S.Ct. at 747 (footnote omitted).

[20] The IRO was an organization sponsored by the United Nations. Its Constitution was signed by the United States on December 16, 1946 (T.I.A.S. No. 1846) and became effective on August 20, 1948. See 62 Stat. 3037. Part two of Annex I of the IRO Constitution, 62 Stat. 3037, 3051 (1946), provided that certain persons would *not* be considered the "concern" of the IRO:

> "1. War criminals, quislings and traitors.
>
> 2. *Any other persons who can be shown:*
>
> (a) *to have assisted the enemy in persecuting civil populations of countries, Members of the United Nations; or*
>
> (b) to have voluntarily assisted the enemy forces since the outbreak of the second world war in their operations against the United Nations."
>
> .... (emphasis added)

"In 1948, Congress enacted the Displaced Persons Act (DPA) to enable European refugees driven from their homelands to emigrate to the United States.[21] Section 2(b) of the DPA, 62 Stat 1009, defined a displaced person eligible for emigration by incorporating the definition of 'refugees or displaced persons' contained in Annex I to the IRO Constitution . . . .[22] A person seeking a visa to the United States under the DPA normally followed a tripartite procedure.

First, a refugee filed an application for IRO assistance. The applicant was interviewed by an IRO eligibility officer who elicited information about the applicant's personal and family history, with special emphasis on the war years, in order to determine whether the applicant was qualified under the IRO

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[21] The mass dislocation of persons caused by the devastation of World War II is well documented. The *Demjanjuk* court capsulized the magnitude of the problem as follows:

> "Following the conclusion of the war, the Allied armies became the guardians of about 8,000,000 persons including those liberated from extermination camps, former prisoners of war, and thousands of other persons dislocated by the hostilities. By 1948, 7,000,000 of these uprooted persons had been repatriated leaving approximately 1,000,000 persons in the United States, British, and French zones of Germany, Austria and Italy. S.Rep. No. 950, 80th Cong., 2d Sess., U.S.Code Cong.& Ad.News 2028, 2035 (1948). Many of these people lived in camps operated by the International Refugee Organization (IRO), an organization founded in 1946 to offer care and assistance to the dislocated masses and to provide for their eventual repatriation."

Slip Op. at 29.

[22] Accordingly, the same persons who were not eligible for IRO assistance were also ineligible for lawful admission into the United States by virtue of Section 2(b) of the DPA. See note 20, *supra*.

constitution . . . . The primary source of background information inevitably came from the applicant himself. If qualified, the refugee was granted IRO assistance.

Next, the refugee sought to qualify as an eligible displaced person under the DPA. The Displaced Persons Commission was the agency in charge of implementing the DPA. Under sections 2(b) and 10 of the DPA, 62 Stat. 1009, 1013, positive eligibility under the IRO was a preliminary requisite. The IRO file containing the history of the particular refugee and the certification of IRO status was forwarded to the Displaced Persons Commission. A case analyst then made certain security checks on the background of the applicant to determine eligibility under the DPA and issued a report certifying that the applicant was a person eligible for admission into the United States under the DPA. . . .

Finally, the case analyst forwarded an applicant's file, containing both the preliminary IRO certification and the Displaced Persons Commission report to the appropriate American Consulate. The applicant appeared at the consular office and was matched with an interpreter-typist, who assisted the applicant in filling out the application for an immigration visa. A vice-consul at the American Consulate reviewed the visa application and other documents in the applicant's file. The vice-consul then interviewed the applicant and, at a minimum, reviewed with the applicant all the entries which appeared on the visa aplication [sic]. If the vice-consul

> deteremined that the applicant met the criteria of the DPA and other immigration laws, he issued the applicant a visa."[23]

The immigration process leading to defendant's entry into the United States began in February 1948 when defendant's father, August Linnas, filed with the Preliminary Commission for the International Refugee organization ("PCIRO")a signed and sworn application for assistance, on behalf of himself and his family, including defendant. (GX-38-B). The application stated that defendant was a student and technical artist in Tartu, Estonia from 1940 through 1943.

In mid-December 1949, defendant's wife, Linda Linnas, filed an IRO Resettlement Registration Form on behalf of herself, defendant and defendant's daughters. (GX-31). In reliance upon the information contained in the Application for Assistance to PCIRO and the Resettlement Registration Form, the IRO certified defendant as a displaced person and refugee, as defined in Annex I of the IRO Constitution, on

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[23] "Section 10 of the DPA was amended by § 9 of the Act of 1950, 64 Stat. 219, 225-226 (1950) to clearly allow the vice-consul to make the final determination of eligibility of applicants, both under the DPA and under the general immigration laws. Conference Report, 81st Congress, 2d Sess., U.S.Code Cong.& Ad.News 2513-2523 (1950). Section 9 provided: 'no person shall be issued an immigration visa or be admitted into the United States under this Act if the consular officer or the immigrant inspector knows or has reason to believe that the alien is subject to exclusion from the United States under any provision of the immigration laws or (1) is not a displaced person and an eligible displaced person, or (2) is not eligible under the terms of this Act. . . .'" *United States v. Demjanjuk*, Dkt. No. C-77-923, Slip Op. at 31 n. 35 (N.D.Ohio June 23, 1981).

December 29, 1949. Karl Linnas in fact was not entitled to such certification.[24]

On April 27, 1951, James McDonald, a case analyst for the United States Displaced Persons Commission (the "Commission"), issued a report stating that Karl Linnas was eligible for consideration for admission into the United States.[25] However, defendant's certification as an eligible displaced person was made possible only as a result of the false statments he had made to members of the Counter Intelligence Corps of the United States Army (the "CIC") that, among other things, he had been a university student in Tartu, Estonia during the period 1940-1943,[26] he had

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[24] The deposition testimony of Daniel Segat, an expert on the eligibility criteria for IRO assistance, was admitted into evidence. (GX-38). Mr. Segat, the Chief Eligibility Officer for the entire IRO operation between September 1950 and September 1951, (GX-38 at 8-9), testified that defendant would have been found ineligible for IRO assistance based on either his service as a concentration camp chief or guard in a German-occupied territory during World War II, (*id.* at 23-24), or based on his voluntary service in an Estonian Police Battalion or an Estonian unit of the Schutzmannschaft, (*id.* at 24).

[25] McDonald's responsibility as a case analyst was to determine an applicant's eligibility status under the DPA. (Record at 478). In making his evaluation, he relied on reports generated by the United States Army Counter Intelligence Corps (the "CIC"). (*id.* at 481). He testified that he would not have certified defendant as an eligible displaced person had he been aware of his service as a concentration camp guard. (*id.* at 483-484).

[26] Dr. Keiland testified that the University at Tartu ("Tartu Ulikool") was closed during the summer and the autumn of 1941. (Record at 184). The consolidated report of German Major General Walther Stahlecker to the German Foreign Office concerning the activities of Einsatzgruppe A (June 23, 1941 through October 15, 1941) reported that educational activities had been halted at both the University of Tartu and the Technical Institute in Tallin. (GX-9-A at 95).

never served in the German Army and he had not been a member of any political group or organization.[27]

On May 17, 1951, defendant filed a signed and sworn Application for Immigration Visa and Alien Registration with the United States Consulate at Munich, Germany, in which he claimed status as a displaced person. Defendant was issued an immigration visa on that same date. Ralph Fratzke, a former Vice Consul, United States of America, testified to the procedures by which visas were issued. He testified that a visa would not have been issued if the vice consul had known of defendant's wartime activities.[28] (Record at 507-508).

On May 21, 1951, defendant was examined by an officer of the Immigration and Naturalization Service (the "INS"), Walter Ziemak, for the purpose of determining whether Linnas was eligible to enter the United States. At that time, defendant signed two copies of INS Form I-144, one in Estonian and one in English. (GX-31). In accordance with the routine practice of the INS, Ziemak explained to defendant the contents of the form after defendant had read it, but before defendant affixed his signature to it. (Record at 525). By signing Form I-144 and then swearing to its contents upon entering the United States on August 17, 1951, defendant twice falsely stated that he had "never advocated or assisted in the persecution of any person because of race, religion or national origin. . . ."

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[27] The Government established that defendant had made these false statements through the testimony of former CIC members Victor Johansen, (Record at 321, *et seq.*), Richard Priem, (*id.* at 374, *et seq.*) and Ray Whiteturky, (*id.* at 402, *et seq.*). See also (GX-39).

[28] Mr. Fratzke testified because the individual responsible for issuing Karl Linnas' visa had died. (GX-41; Record at 501-502).

B. Defendant's Naturalization

Defendant executed an application to file a petition for naturalization as an American citizen on July 4, 1959. (GX-31). The INS checked petitioner's application against his immigration and visa file to determine that defendant's entry into the United States had been lawful.[29] (Record at 541-542, 544). It was routine practice for INS naturalization examiners to orally question petitioners concerning each of the questions on the application for naturalization. (*id.* at 545). Each applicant's interview was conducted under oath. (*id.* at 543). On December 14, 1959, defendant was examiuned by the INS and falsely swore to the contents of his petition. Specifically, in answer to question 23, defendant denied that he had ever "committed a crime involving moral turpitude" or that he had ever "given false testimony for the purpose of obtaining any benefits under the immigration and naturalization laws."

On February 5, 1960, the Supreme Court of Suffolk County, New York, without knowledge of defendant's true activities and whereabouts during World War II, admitted defendant to United States citizenship.

C. Conclusion of Law

The United States Constitution vested Congress with plenary power in establishing rules for naturalization.[30] Pursuant to that power, Congress enacted Sections 340(a) of the Immigration and Nationality Act, 8 U.S.C. § 1451(a), which provides that a naturalized citizen shall suffer the loss of his citizenship

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[29] David Ilschert, a former naturalization examiner in the New York office during the period in which defendant was naturalized, testified concerning the naturalization process. (Record at 537, *et seq.*).

[30] Congress is empowered to "establish a uniform Rule of Naturalization" under Article I, Section 8, Clause 4.

if the privileged status was "illegally procured" or "procured by concealment of a material fact or by willful misrepresentation." We find that defendant's denaturalization is required under either standard.

1. Citizenship Illegally Procured

Citizenship is illegally procured if "some statutory requirement which is a condition precedent to naturalization is absent at the time the petition [for naturalization] was granted." H.R.Rep.No. 1086, 87th Cong., 1st Sess. 39, *reprinted in*, U.S.Code & Ad.News 2950, 2983 (1961). *See Rogers v. Bellei*, 401 U.S. 815, 830 (1971); *United States v. Ginsburg*, 243 U.S. 472, 475 (1917). Here, defendant lacked two statutory prerequisites for citizenship.

a. Defendant Was never Lawfully Admitted to the United States[31]

Since defendant entered the country under the Displaced Persons Act, the legality of his entry depends upon his eligibility under that Act. Section 2 of the DPA makes ineligible those persons who *"have assisted the enemy in persecuting civil populations of countries, Members of the United Nations . . . ."*[32] (emphasis added).

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[31] The requirements for legally procuring naturalized citizenship are set out in Section 316 of the Immigration and Nationality Act, 8 U.S.C. § 1427. Section 316(a)(1) provides, *inter alia*, that:

> *Residence*
>
> (a) No person, except as otherwise provided in this title, shall be naturalized unless such petitioner (1) immediately preceding the date of filing his petition for naturalization has resided continuously, after being *lawfully* admitted for permanent residence, within the United States for at least five years ***. (Emphasis added).

[32] See note 22, *supra*. Further, Section 13 of the DPA, as amended in 1950, 64 Stat. 227, provided that no visa would be issued under the Act to "any person who advocated or assisted in the persecution of any person because of race, religion, or national origin. . . ." Accordingly, we also find that defendant failed to satisfy Section 13 of the DPA.

The facts speak for themselves. It is beyond dispute that defendant, Karl Linnas, "assisted the enemy in persecuting civil populations of countries, Members of the United Nations." *See Fedorenko v. United States*, 101 S.Ct. at 750 ("an individual's service as a concentration camp armed guard–whether voluntary or involuntary–made him ineligible for a visa"). The inescapable conclusion is that defendant unlawfully entered the country because of the willful misrepresentations he made to the CIC and the INS for the purpose of gaining entrance into the United States:

> ". . . Any person who shall willfully make a misrepresentation for the purpose of gaining admission into the United States as an eligible displaced person shall thereafter not be admissible into the United States." Section 10 of the DPA, 62 Stat. 1013.

Under the explicit terms of the law governing defendant's entry, his willful,[33] material[34] misrepresentations made him ineligible for a visa.

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[33] The evidence which we have discussed compels the conclusion that defendant's misrepresentations concerning his wartime activities, specifically, his participation in Nazi atrocities, were not inadvertent. Rather, his misrepresentations were knowing and willful. This conclusion is further supported by defendant's perjury in 1946 during which time he filed a signed and sworn questionnaire for displaced persons. (GX'32). In it he stated that, during the years 1941 and 1942, he was employed as a temporary draftsman and student. In response to a question requiring disclosure of all military and political activity from 1936 to 1946, he failed to disclose any military service during 1941 and 1942.

[34] Defendant's misrepresentations concerning his service of the German Reich were material. Each of the Government witnesses questioned concerning the consequences of having served as a guard in a concentration camp indicated that such an individual would be ineligible for either IRO assistance or for

(footnote continued on following page)

b. Defendant Lacked the Requisite Moral Character

The second unsatisfied statutory condition precedent which made defendant's entry into this country unlawful derived from his lack of good moral character at the time he entered the United States. We find that defendant did not possess the required good moral character because of his voluntary involvement in the unjustifiable atrocities committed against men, women and children a relatively short period of time prior to his entry into this country. *See Tieri v. INS*, 457 F.2d 391 (2d Cir. 1972).

Section 316(a)(3) of the Immigration and Nationality Act, 8 U.S.C. § 1427(a)(3), provides in pertinent part that:

> "(a) No person, except as otherwise provided in this subchapter, shall be naturalized unless such petitioner, *** (3) during all the period referred to in this subsection has been and still is a person of good moral character. . . ."

Because we find that defendant failed to satisfy this condition for naturalization his award of citizenship was unlawful and must be revoked pursuant to Section 340(a) of the Immigration and Nationality Act, 8 U.S.C. § 1451(a).[35]

(footnote continued from preceding page)
immigration under the DPA. (GX-38 at 24; Record at 342, 389, 484, 508-509, 528-529). "At the very least, a misrepresentation must be considered material if disclosure of the true facts would have made the applicant ineligible for a visa." *Fedorenko v. United States*, 101 S.Ct. at 749. The misrepresentation was equally material for purposes of defendant's naturalization. (Record at 557-558, 562).

[35] Defendant's lack of good moral character is also established by virtue of the false statements made on his petition for naturalization. Section 101(f)(6) of the Immigration and Nationality Act, 8 U.S.C. § 1101(f)(6), provides in pertinent part:

(footnote continued on following page)

Based on the foregoing, it is patently clear that defendant's citizenship was illegally procured and must be revoked.

2. Citizenship Procured by Concealment of a Material Fact or By Willful Misrepresentation

An alternative ground requiring the cancellation of defendant's certificate of naturalization ensues from the willful, material misrepresentations he made to the Government during the procedures leading to his naturalization in 1960. Section 340(a) of the Immigration and Nationality Act, 8 U.S.C. § 1451(a). In stating (1) that he had never "committed a crime involving moral turpitude," (GX-31, Form N-400, question 23) and (2) that he was and had been "during all periods required by law, a person of good moral character," (GX-31, Form N-405, statement 15), defendant knowingly concealed, among other things, the facts of his service at the concentration camp in Tartu, Estonia during World War II. These facts were material under any view of the test of materiality as announced in *Chaunt v. United States*, 364 U.S. 350 (1960). *See Fedorenko v. United States, supra.* Consequently, defendant's naturalization must be revoked because it was procured by a willful misrepresentation of material facts.

"No person shall be regarded as, or found to be, a person of good moral character who, during the period for which good moral character is required to be established is, or was . . .

* * *

(6) one who has given false testimony for the purpose of obtaining any benefits under this Act."

The misrepresentations made to the Displaced Persons Commission and Vice-Consul were false statements within the meaning of Section 101(f)(6) of the Immigration and Nationality Act.

IV. Conclusion

For the reasons set forth above, it is hereby

ORDERED that the order of the Supreme Court of the State of New York, Suffolk County, dated February 5, 1960, admitting defendant, Karl Linnas, to United States citizenship be, and the same is, hereby revoked and vacated, and his Certificate of Naturalization, Number 7641679, is cancelled on the grounds that such order and Certificate were illegally procured and were procured by willful misrepresentation of material facts under Section 340(a) of the Immigration and Nationality Act, 8 U.S.C. § 1451(a); and it is further

ORDERED that Linnas' Certificate of Naturalization, Number 7641679, shall be surrendered and delivered by Linnas to the Attorney General of the United States or his representative, the United States Attorney for the Eastern District of New York, on or before August 15, 1981;[36] and it is further

ORDERED that Karl Linnas is forever restrained and enjoined from claiming any rights, privileges or advantages of United States citizenship, including under or through any document evidencing United States citizenship; and it is further

ORDERED that the Clerk of the Court is directed: (1) to send forthwith a certified copy of this memorandum of decision and order to the Attorney General of the United States;[37] (2) to send a certified copy of

---

[36] *See* 8 U.S.C. § 1451(h). Surrender of defendant's Certificate of Naturalization is stayed pending appeal upon the condition that defendant file a notice of appeal within ten (10) days from the date of entry of judgment and diligently prosecute said appeal.

[37] *See* 8 U.S.C. § 1451(h).

this memorandum of decision and order, and a certified copy of the judgment to be entered forthwith, to the Supreme Court of the State of New York, County of Suffolk,[38] and (3) to expeditiously enter judgment in favor of plaintiff United States of America and against Karl Linnas granting the relief requested in the complaint.

/s/ _____
U. S. D. J.

[38] *See* 8 U.S.C. § 1451(h).

Opinion of the District Court (denaturalization), dated July 30, 1981

Appendix A

The facts found in our October 24, 1980 decision were as follows:

1. Defendant resided in the city of Tartu, Estonia, during all or part of the period July1, 1941 to May 31, 1943, at or near a site known as "the Kuperjanov Barracks."

2. In 1949, defendant resided in or near Neuberg, Germany where, during 1949, he initiated or caused to be initiated application precedures for a United States Immigiation Visa as a displaced person, pursuant to the Immigration and Nationality Act of 1924, as amended, and the Displaced Persons Act of 1948, Pub.L.No. 774 (62 Stat. 1009).

3. Defendant did not attend the University of Tartu at any time after July 1, 1941. He did attend and graduate from an Estonian Army Officers Traning Academy prior to the date, and on that date held the rank of Second Lieutenant or its equivalent in the Estonian Army Reserve.

4. On or before July 1, 1941, defendant was a member of the paramilitary organization known as the "Omakaites." Defendant held the rank of Second Leiutenant in this organization, which assisted the military forces of Nazi Germany in conducting arrests, imprisonments, physical abuse, and execution of unarmed civilians in German-occupied Estonia during all or part of the period July 1, 1941 to May 31, 1943.

5. During the period August, 1941 to May 1943, military and paramilitary forces of Estonia and Nazi Germany established and administered, under the supervision of the occupying military and police forces of Nazi Germany, concentration camps at various sites in Tartu, Estonia, including, but not limited to, those sites known as "Naituse Valjak" and the Kuperjanov Barracks," in which unarmed Estonia civilians, including

men, women and children were imprisoned on the basis of race, religion or political opinion.

6. Defendant commanded the Tartu concentration camps at Tartu, Estonia, or was a member of the security forces of said concentration camps, during all or part of the period August, 1941 to May, 1942, inclusive.

7. During the period August, 1941 to May, 1942, the security forces at the Tartu concentration camps included what was known as the "special section," which selected prisoners, including unarmed civilian men, women and children to be put to death.

8. On one or more occasions between August, 1941 and May, 1942, defendant, on the basis of a list prepared and supplied to him by the aforesaid "special section" supervised the removal of prisoners from the barracks at the Tartu concentration camp and their transfer to a site known as the "Jalaka Line" located near Tartu, and there supervised their execution.

9. In this capacity as an officer at the Tartu concentration camps, defendant wore the uniform of a Second Lieutenant or equivalent rank of the pre-1940 Estonian Army. He was armed with a pistol, which he carried to the aforesaid execution site, and from time to time fired that pistol at unarmed civilians in the course of their executions.

10. On or about May 26, 1942, defendant became a member of a military unit known as the Security Cadre Unit 41"E", as acting platoon leader of the heavy machine gun company. This unit assisted the military and police forces of Nazi Germany in Operations in German-occupied Estonia.

11. On August 30, 1944, defendant was a member of a military organization known as the 38th Estonian Police Battalion, in which he served as a Second Lieutenant or equivalent rank. This unit assisted the military

and police forces of Nazi Germany in operations in German-occupied Estonia.

12. For some or all of his services at the Tartu concentration camps, in the heavy machine gun company of Security Cadre Unit 41 "E", and in the 38th Estonian Police Battalion, defendant was paid by the government of Nazi Germany.

13. On August 30, 1944, while a Second Leiutenant or its equivalent rank in the 38th Estonian Police Battalion, defendant was wounded and evacuated to Nazi Germany, at which time defendant continued to be supported by the government of Nazi Germany.

Appendix B

The findings of fact were as follows:

FACT: On August 22, 1945, United States military authorities issued to defendant an "A.E.F. Registration Record," also known as a "DP-2 card."

FACT: On or about August 27, 1946, defendant filed with the Third United States Army at Gerstsried Displaced Persons camp in Germany, a questionaire for displaced persons, in the Estonian language, signed and sworn by defendant. [GX-32 admitted into evidence].

In response to this questionaire, defendant stated, in item 6(b), that during the years 1941 and 1942, his occupation was as temporay draftsman and student. He further stated, in response to a question requiring disclosure of all military and political activity 1936-1946 (item 7), that his only service was in the Army of the Democratic Estonian Republic, 1938-1940, as a sergeant, and in as Estonian security ballalion in Tartu, Estonia 1943 to 1944, as a sergeant. In fact, during all or part of the period August 1941 to May 1942, inclusive, defendant was a member of the *Omakaitse* (Estonian Self-Defense) with the rank of second lieutenant, and commanded or was a member of the security forces of the Tartu con-

centration camps at Tartu, Estonia, and at no time during the period August 1941 to May 1942 was he a student.

Following defendant's misrepresentation, the Third United States Army established defendant's status as a displaced person.

FACT: On July 5, 1947, United States military authorities issued to defendant an "A.E.F. Registration Record," also known as a "DP-3 card". . . .

FACT: On or about February 6, 1948, defendant's father, August Linnas, with defendant's knowledge and approval, filed with the Preliminary Commission for the International Refugee organization a signed and sworn Application for Assistance (CM/1 form), in the German language, numbered 845742, on behalf of August Linnas, Ida Linnas (defendant's mother), Karl Linnas (defendant), Linda Linnas (defendant's wife), and Anu and Tiina Linnas (defendant's daughters) (GX-38-B admitted into evidence). This application stated that from 1940 to 1943 Karl Linnas was a student and technical artist in Tartu, Estonia, and further that he was a university student from 1938 to 1943, when in fact, during all or part of the period August 1941 to May 1942 inclusive, defendant commanded or was a member of the security forces of the Tartu concentration camps at Tartu, Estonia, and at no time during the period August 1941 to May 1942 was he a student.

FACT: On or about December 16, 1949, defendant's wife, Linda Linnas, with defendant's knowledge and approval, filed an International Refugee Organization Resettlement Registration Form, bearing CM-1 number 845742, signed and sworn by Linda Linnas, on behalf of Linda Linnas, Karl Linnas (defendant) and Anu and Tiina Linnas (defendant's daughters) [GX-38-C admitted into evidence].

In reliance upon information provided in this form and in other documents referenced in this form, on

Opinion of the District Court (denaturalization), dated July 30, 1981

APPENDIX B

December 29, 1949 the International Refugee Organization certified defendant as a displaced person and refugee, as defined in Annex I of the IRO Constitution, and as of concern to the IRO, when in fact, by virture of his activities at the Tartu concentration camps, he was not entitled to such certification.

FACT: On one or more occasions prior to April 27, 1951, defendant was interviewed by representatives of the Counter Intelligence Corps, United States Army (hereinafter CIC) on behalf of the United States Displaced Persons Commission, for the purpose of establishing eligibility as a displaced person under the Displaced Persons Act of 1948, as amended. Defendant stated to the CIC that he was drafted into the Estonian Army on July 1, 1938 and served until June 1940, that he was again drafted into the Estonian Army on May 22, 1943 and served with the "Estonian Home Guard, Kreis Tartu" in the vicinity of Tartu, Estonia until he was wounded in August 1944, that he never served in the German Army or wore a German Army uniform, and that he had not been a member of any political group or organization, when in truth and in fact, as the defendant well knew, he had been a second lieutenant in the Omakaitse (Estonian Self-Defense) and in that capacity had been a commander or member of the security forces of the Tartu concentration camps during all or part of the period August 1941 to May 1942.

FACT: On or about April 27, 1951, James P. McDonald, a case analyst for the United States Displaced Persons Commission (hereinafter the Commission), based on the Commission's investigation and on statements, certifications and other documents contained in the Commission's files, issued on behalf of the Commission a report stating that the Commission had established that defendant had not advocated or assisted in the persecution of any person because of race, religon or national origin, and certified him as eligible for consideration

for admission to the United States as a displaced person under Section 2(c) of the Displaced Persons Act of 1948, as amended.

FACT: On or about May 17, 1951, defendant filed an Application for Immigrant Visa and Alien Registration (Form 256a), signed and sworn by defendant, with the United States Consulate at Munich, Germany in which he claimed status as a displaced person [GX-31 admitted into evidence]. Attached as part of this application was the photograph of defendant, signed on the front and back by him. Also filed as part of this application and submitted herewith as part of [GX-31] was identity card number 004235 for Karl Linnas, dated August 22, 1941, a marriage certificate for Karl Linnas and Linda Saks, dated July 7, 1944, and four good conduct certificates pertaining to defendant's conduct in post-war Germany.

FACT: On August 17, 1951, defendant entered the United States for the purpose of immigration at New York, New York. Upon entry into the United States, he signed and swore to two copies of an "Affidavit as to Subversive Organizations or Movements" (INS Form I-144) [GX-31 admitted into evidence], one in the Estonian language and one in the English language, stating that he had never advocated or assisted in the persecution of any person because of race, religion or national origin. This affidavit had been read by and explained to defendant by an American official at Augsburg, Germany on or about May 21, 1951.

Appendix C

One of the documents establishing defendant's service in the 38th Estonian Police Battalion is Government Exhibit 15-A, a German Nazi document captured by the allies, which reads as follows:

Opinion of the District Court (denaturalization), dated July 30, 1981

APPENDIX C

(stamp) (120)
Higher SS and Police Commander (HSSPf), (stamp:
Baltic Sea Feb. 13, 1945)
Welfare Headquarters–Subsidiary Office I
Schwerin, Feb. 2,
File symb.: F.U.Ausland Ja/HO Arsenal 1945
Subj.: Volunteer pay

(stamp: Office for
To: Member Support Abroad
SS Race & Colonization Main Office rec.: Feb. 10, 1945)
–Office for Member Support Abroad–

Prague II

Karl Laznowsky Quay 60

The Estonian volunteer, Lieutenant of Protective Police *Karl Linnas*, born on Aug. 6, 1919, belongs to Police Front Battalion 38, APO no. 46,903, he was wounded on Aug. 30, 1944. He is now under outpatient treatment here in Schwerin and is residing with his wife at Severinstr. 34. He has been married since July 7, 1944.

About mid-December 1944 he applied to you through his hospital for continued disbursement of compat pay, which he has not received since July 1, 1944.

I request to be informed immediately as to what became of his application, since the combat pay is urgently required for his living expenses. Remittance can be made to account no. 6082 of the Sparkasse (Savings Bank) in Schwerin/Mecklenburg.

(stamp: NOT IN FILE)

(signature)

SS 1st Lieut. (Reserve)

Order of the Court of Appeals denying rehearing, dated June 25, 1986

UNITED STATES COURT OF APPEALS
SECOND CIRCUIT

At a stated term of the United States Court of Appeals, in and for the Second Circuit, held at the United States Courthouse, in the City of New York, on the 25th day of June one thousand nine hundred and eighty-six

---

KARL LINNAS,

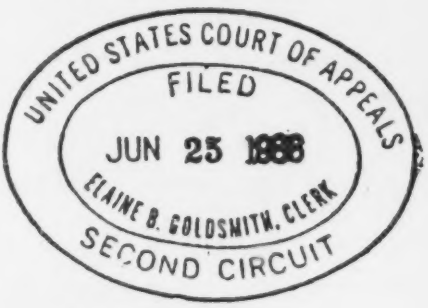
Petitioner,

-V-

Docket No. 85-4163

IMMIGRATION AND NATURALIZATION SERVICE,

Respondent.



A petition for rehearing containing a suggestion that the action be reheard in banc having been filed herein by counsel for the Petitioner KARL LINNAS,

Upon consideration by the panel that heard the appeal, it is

Ordered that said petition for rehearing is DENIED.

It is further noted that the suggestion for rehearing in banc has been transmitted to the judges of the court in regular active service and to any other judge that heard the appeal and that no such judge has requested that a vote be taken thereon.

Elaine B. Goldsmith
Clerk

Order of the Court of Appeals granting a stay of issuance of its mandate, dated June 30, 1986

United States Court of Appeals
For the Second Circuit

Karl Linnas

v.

Immigration & Naturalization Service

85-4163
Docket Number

NOTICE OF MOTION

state type of motion
for stay of mandate pending application for certiorari

* * *

Brief statement of the relief requested: An order pursuant to Fed.R.App.P. 41(b) granting a 30-day stay of the issuance of the mandate of this Court pending application to the Supreme Court for a writ of certiorari, and if this relief is denied, for a brief stay to permit a motion to be made to a Justice of the Supreme Court for such a stay of the mandate.

Complete Page 2 of This Form

Order of the Court of Appeals granting a stay of issuance of its mandate, dated June 30, 1986

By: *(Signature of attorney)*

/s/ Ramsey Clark

Signed name must be printed beneath

Ramsey Clark

Appearing for: *(Name of party)*

Karl Linnas

Date

June 26, 1986

Appellant or Petitioner:
☐ Plaintiff ☒ Defendant

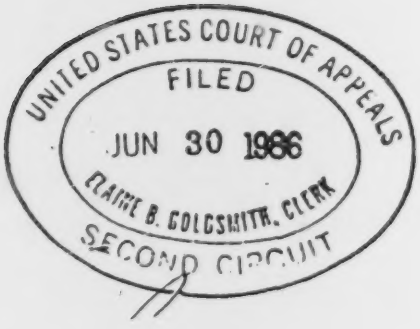
Appellee or Respondent:
☐ Plaintiff ☐ Defendant

---------- ORDER ----------

IT IS HEREBY ORDERED that the motion be and it hereby is granted

6/30/86

Date



Order of the Court of Appeals granting an extension of stay of issuance of its mandate, dated July 31, 1986

United States Court of Appeals
For the Second Circuit

Karl Linnas

v.

Immigration & Naturalization Service

Use short title

85-4163
Docket Number

NOTICE OF MOTION

state type of motion
for extension of stay of mandate pending application for certiorari

Order of the Court of Appeals granting an extension of stay of issuance of its mandate, dated July 31, 1986

Judge or agency whose order is being appealed:
Board of Immigration Appeals and Court of Appeals affirmance

Brief statement of the relief requested: An order pursuant to Fed.R.App.P. 41(b) granting a 30-day extension of the present stay of the issuance of the mandate of this Court pending application to the Supreme Court for a writ of certiorari, and if this relief is denied, for a brief stay to permit a motion to be made to a Justice of the Supreme Court for a stay pursuant to 28 U.S.C. sec. 2101 (f)

Complete Page 2 of This Form

By: *(Signature of attorney)*

/s/ Ramsey Clark

Signed name must be printed beneath

Ramsey Clark

Appearing for: *(Name of party)*

Karl Linnas

Date

July 28, 1986

Appellant or Petitioner:
☐ Plaintiff ☒ Defendant

Appellee or Respondent:
☐ Plaintiff ☐ Defendant

---------- ORDER ----------

Kindly leave this space blank

IT IS HEREBY ORDERED that the motion be and it hereby is granted.

/s/ Lawrence W. Pierce

/s/ Roger J. Miner per LWP

July 31st 86

Date

/s/ Frank X. Altimari

Circuit Judge

Constitutional and Statutory Provisions

United States Constitution

Article I, section 9, clause 3.

No Bill of Attainder or ex post facto Law shall be passed.

Fifth Amendment

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

Eighth Amendment

Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted.

Immigration and Nationality Act of 1952, as amended
Sec. 241(a)(19), 8 U.S.C. §1251(a)(19)

Deportable aliens – general classes

(a) Any alien in the United States (including an alien crewman) shall, upon the order of the Attorney General, be deported who –

* * *

(19) during the period beginning on March 23, 1933, and ending on May 8, 1945, under the direction of, or in association with –

(A) the Nazi government of Germany,

(B) any government in any area occupied by the military forces of the Nazi government of Germany,

(C) any government established with the assistance or cooperation of the Nazi government of Germany, or

(D) any government which was an ally of the Nazi government of Germany,

ordered, incited, assisted, or otherwise participated in the persecution of any person because of race, religion, national origin, or political opinion.

Immigration and Nationality Act of 1952, as amended
Sec. 243(a) and (h), 8 U.S.C. Sec. 1253(a) and (h)

Countries to which aliens shall be deported

(a) Acceptance by designated country; deportation upon nonacceptance by country

The deportation of an alien in the United States provided for in this Act, or any other Act or treaty, shall be directed by the Attorney General to a country promptly designated by the alien if that country is willing to accept him into its territory, unless the Attorney General, in his discretion, concludes that deportation to such country would be prejudicial to the interests of the United States. No alien shall be permitted to make more than one such designation, nor shall any alien designate, as the place to which he wishes to be deported, any foreign territory contiguous to the United States or any island adjacent thereto or adjacent to the United States unless such alien is a native, citizen, subject, or national of, or had a residence in such designated foreign contiguous territory or adjacent island. If the government of the country designated by the alien fails finally to advise the Attorney General within three months following original inquiry whether that government will or will not accept such alien into its territory, such designation may thereafter be disregarded. Thereupon deportation of such alien shall be directed to any country of which such alien is a subject, national, or citizen if such country is willing to accept him into its territory. If the government of such country fails finally to advise the Attorney General or the alien within three months following the date of original inquiry, or within such other period as the Attorney General shall deem reasonable under the circumstances in a particular case, whether that government will or will not accept such alien into its territory, then such deportation shall be directed by the Attorney General within his discretion and without necessarily giving any priority or preference because of their order as herein set forth either —

(1) to the country from which such alien last entered the United States;

Immigration and Nationality Act of 1952, as amended Sec. 243(a) and (h), 8 U.S.C. § 1253(a) and (h) (continued)

(2) to the country in which is located the foreign port at which such alien embarked for the United States or for foreign contiguous territory;

(3) to the country in which he was born;

(4) to the country in which the place of his birth is situated at the time he is ordered deported;

(5) to any country in which he resided prior to entering the country from which he entered the United States;

(6) to the country which had sovereignty over the birthplace of the alien at the time of his birth; or

(7) if deportation to any of the foregoing places or countries is impracticable, inadvisable, or impossible, then to any country which is willing to accept such alien into its territory.

* * *

(h) Witholding of deportation or return

(1) The Attorney General shall not deport or return any alien (other than an alien described in section 1251(a)(19) of this title) to a country if the Attorney General determines that such alien's life or freedom would be threatened in such country on account of race, religion, nationality, membership in a particular social group, or political opinion.

(2) Paragraph (1) shall not apply to any alien if the Attorney General determines that —

(A) the alien ordered, incited, assisted, or otherwise participated in the persecution of any person on account of race, religion, nationality, membership in a particular social group, or political opinion;

Immigration and Nationality Act of 1952, as amended Sec. 243(h), 8 U.S.C. Sec. 1253(h) (continued)

(B) the alien, having been convicted by a final judgment of a particularly serious crime, constitutes a danger to the community of the United States;

(C) there are serious reasons for considering that the alien has committed a serious non-political crime outside the United States prior to the arrival of the alien in the United States; or

(D) there are reasonable grounds for regarding the alien as a danger to the security of the United States.

Immigration and Nationality Act of 1952, as amended
Sec. 244(e), 8 U.S.C. §1254(e)

Voluntary departure

The Attorney General may, in his discretion, permit any alien under deportation proceedings, other than an alien within the provisions of paragraph (4), (5), (6), (7), (11), (12), (14), (15), (16), (17), (18), or (19) of section 1251(a) of this title (and also any alien within the purview of such paragraphs if he is also within the provisions of paragraph (2) of subsection (a) of this section), to depart voluntarily from the United States at his own expense in lieu of deportation if such alien shall establish to the satisfcation of the Attorney General that he is, and has been, a person of good moral character for at least five years immediately preceding his application for voluntary departure under this subsection.

File: A8 085 626
IN RE: KARL *LINNAS*
IN DEPORTATION PROCEEDINGS

DECLARATION

I, Davis R. Robinson, declare as follows:

1. I am the Legal Adviser of the Department of State and have held that office since July, 1981.

2. In that capacity, I am responsible for the legal aspects of the formulation and implementation of United States foreign policy, including questions pertaining to State recognition. This Declaration is based on my personal knowledge or on information that I have received in the performance of my office duties as Legal Advisor.

3. I have been informed about the case of Karl *Linnas* and the July 31, 1984 decision of the Board of Immigration Appeals which raises a question concerning "the effect of the Soviet annexation of Estonia upon designation of a country of deportation" and which remands the case to the immigration judge *inter alia* to "consider the implications of the United States' refusal to recognize the Soviet annexation of Estonia . . . and articulate the statutory basis for selecting whichever country is designated." Slip op. at 16-17. Based on a request from the immigration judge for the position of the United States Government on this issue, the Department of Justice has requested the views of the Department of State concerning the effect of deportation of Mr. Linnas to the U.S.S.R. on the United States policy of non-recognition of the forcible Soviet incorporation of Estonia.

4. The Department of State has been informed by the Department of Justice that the U.S.S.R. is willing to accept Mr. Linnas into its territory. In addition, at the current time, no other country has agreed to accept Mr. Linnas.

5. The Department of State also has been informed that it is the position of the Department of Justice that deportation of

Mr. Linnas to the U.S.S.R. would be pursuant to section 243(a)(7) of the Immigration and Nationality Act, 8 U.S.C. § 1253(a)(7). Under that section, deportation is directed "to any country which is willing to accept such alien into its territory." I have concluded, on the basis of the position of the Department of Justice, that the deportation of Mr. Linnas under 8 USC 1253 (a)(7) to a place which we regard as within the territory of the U.S.S.R. would not as a matter of law contravene the longstanding and firmly held United States policy of nonrecognition of the forcible incorporation of Estonia into the U.S.S.R.

Pursuant to 28 U.S.C. § 1746(2), I declare under penalty of perjury that the foregoing is true and correct.

Executed at Washington, D.C.

on: December 20, 1984

/s/ Davis R. Robinson

DAVIS R. ROBINSON
LEGAL ADVISER